

# **EXHIBIT 1**

Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

Gordon Hempton,

Plaintiff,

v.

Pond5, Inc., a Delaware Corporation; and  
Pond5 user ckennedy342, a corporation or  
individual of type unknown,

Defendants.

NO. 3:15-cv-05696-DWC

PLAINTIFF'S FIRST  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION OF DOCUMENTS

TO: Pond5, Inc.; and

TO: Curt H. Feig and Larry E. Altenbrun of Nicoll Black & Feig PLLC, attorneys for  
Pond5, Inc.

PLEASE TAKE NOTICE that, pursuant to FRCP 26, FRCP 33, and FRCP 34, Plaintiff  
Gordon Hempton requests you answer the following Plaintiff's First Interrogatories and  
Requests for Production of Documents, here propounded.

**Interrogatories.** You are requested to answer the following interrogatories in writing,  
under oath, and you and your attorney must then sign them below, before serving, within  
30 days after they are served on you, upon the undersigned counsel at the offices of Breskin  
Johnson & Townsend PLLC, 1000 Second Avenue, Suite 3670, Seattle, WA 98104. These

PLAINTIFF'S FIRST INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF DOCUMENTS - 1  
(No.3:15-cv-05696-RBL)

BRESKIN | JOHNSON | TOWNSEND PLLC  
1000 Second Avenue, Suite 3670  
Seattle, Washington 98104 Tel: 206-652-8660

**INTERROGATORIES AND REQUESTS FOR PRODUCTION**

**INTERROGATORY NO. 1:** Identify all Customers who downloaded Gordon Hempton's copyrighted works of authorship from January 1, 2012 to the present. Identify and describe with particularity all efforts to recall Mr. Hempton's material or otherwise respond to your knowledge that Mr. Hempton did not authorize the use of his works.

**ANSWER:**

**INTERROGATORY NO. 2:** Identify all Contributors who uploaded Plaintiff's copyrighted works of authorship. Identify and describe with particularity all efforts to recall Mr. Hempton's material or otherwise respond to Mr. Hempton's assertion that he did not authorize the use of his works.

**ANSWER:**

**INTERROGATORY NO. 3:** Identify and describe with particularity all methods in place at Pond5 from January 1, 2012 to the present to detect against the uploading, downloading, display, copying or distribution of works of authorship without authorization from the copyright owner or other party with authority to license the content.

**ANSWER:**

**INTERROGATORY NO. 4:** Identify all processes that Pond5 utilizes or has utilized to detect whether or not a sound recording is copyrighted or has a registered copyright with the United States Copyright Office. If different processes were used at different times since January 1, 2012, identify the relevant time frame when each process with designed, created and implemented.

1           **RESPONSE:**

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4           **REQUEST FOR PRODUCTION NO. 3:** Please provide a complete accounting of  
5 the history of Gordon Hempton's copyrighted sound files on Pond5, including which files have  
6 been downloaded, when they were downloaded and/or purchased, who downloaded and/or  
7 purchased them (including name, username, IP addresses, identity, location, business for whom  
8 the Contributor was an agent, paypal username, paypal payment data information available to  
9 Pond5), as well as how much the Contributor paid to download each file.

10          **RESPONSE:**

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12  
13          **REQUEST FOR PRODUCTION NO. 4:** Please provide all documents related to  
14 Pond5 user ckennedy342, including but not limited to his/her/its name, identity, address, IP  
15 address, history of uploads, paypal payment data, any associated usernames or other  
16 username(s) that Pond5 knows or suspects of being the same actual person/entity as  
17 ckennedy342 or in any way associated with ckennedy342.

18          **RESPONSE:**

19  
20  
21          **REQUEST FOR PRODUCTION NO. 5:** Please provide all documents related to  
22 Pond5's attempt to identify the Contributor ckennedy342 and terminate ckennedy342's  
23 account.

24          **RESPONSE:**

1           **REQUEST FOR PRODUCTION NO. 6:** Please provide all documents and  
2 information received by Pond5 from the user ckennedy342.

3           **RESPONSE:**  
4  
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6           **REQUEST FOR PRODUCTION NO. 7:** Please provide all documents and  
7 information received by Pond5 from any user who uploaded or downloaded Gordon Hempton's  
8 works.

9           **RESPONSE:**  
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12           **REQUEST FOR PRODUCTION NO. 8:** Please produce all documents related to any  
13 other lawsuits, claims and/or settlements against or involving Pond5 related to any allegation  
14 that Pond5 sold, hosted, licensed or made available to third parties on Pond5's website without  
15 authorization by the author, owner, licensor, licensee or copyright holder.

16           **RESPONSE:**  
17  
18

19           **REQUEST FOR PRODUCTION NO. 9:** Please produce all documents related to  
20 efforts that Pond5 takes or has taken in the past to detect unauthorized use of files and/or  
21 Contributors who are uploading files without proper authorization, including any internal  
22 protocols, detection software, third-party studies or research regarding the nature or extent of  
23 pirated files on Pond5, Pond5's exposure and/or liability related to such files, and any  
24 efforts/mechanisms/tools that Pond5 could employ to identify and/or combat piracy and/or  
25 copyright infringement.

26           **RESPONSE:**  
27

1           **REQUEST FOR PRODUCTION NO. 15:** Please produce any Pond5 organizational  
2 charts from January 1, 2012 to the present.

3           **RESPONSE:**  
4  
5

6           **REQUEST FOR PRODUCTION NO. 16:** Please produce all documents related to  
7 any efforts Pond5 has undertaken to contact Contributors who have downloaded and/or  
8 purchased Gordon Hempton's works.

9           **RESPONSE:**  
10  
11

12           **REQUEST FOR PRODUCTION NO. 17:** Please produce all correspondence related  
13 to any claims that Gordon Hempton's works were uploaded or downloaded onto Pond5's  
14 system or servers without Mr. Hempton's authorization.

15           **RESPONSE:**  
16  
17

18           **REQUEST FOR PRODUCTION NO. 18:** Please produce any and all documents that  
19 related to your affirmative defenses asserted in your Answer in this lawsuit.

20           **RESPONSE:**  
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22

23           **REQUEST FOR PRODUCTION NO. 19:** Please produce all documents related to  
24 your claim that "Pond5 is entitled to the safe harbor protections under the Digital Millennium  
25 Copyright Act. Without limitation, Pond5 is specifically entitled to the safe harbor protections  
26 afforded pursuant to 17 U.S.C. § 512(c)."

27           **RESPONSE:**

**REQUEST FOR PRODUCTION NO. 20:** Please produce all documents related to your claim that “Plaintiff’s claims against Pond5 may be barred by the doctrine of fair use.”

**RESPONSE:**

DATED this 10th day of December, 2015.

BRESKIN JOHNSON & TOWNSEND PLLC

By: s/ Roger M. Townsend  
Roger M. Townsend, WSBA No. 25525  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
(206) 652-8660  
(206) 652-8290 Fax  
rtownsend@bjtlegal.com

# **EXHIBIT 2**



THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GORDON HEMPTON,

Plaintiff,

v.

POND5, INC., A DELAWARE  
CORPORATION; AND POND5 USER  
CKENNEDY342, A CORPORATION OR  
INDIVIDUAL OF TYPE UNKNOWN,

Defendants.

No.: 3:15-cv-05696-RBL

**PLAINTIFF'S FIRST  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION OF DOCUMENTS  
AND DEFENDANT POND5'S  
OBJECTIONS, ANSWERS AND  
RESPONSES THERETO**

COMES NOW Defendant Pond5, Inc. ("Pond5") and, pursuant to the Federal Rules of Civil Procedure, provides the following objections, answers, and responses to Plaintiff's First Interrogatories and Requests for Production.

**GENERAL OBJECTIONS**

Pond5 hereby incorporates the following General Objections into each and every individual response contained herein and into any future amendment, supplement or modification to these responses, as well as any future discovery request of the plaintiff.

1. Pond5's responses and objections are based upon information and belief after a reasonably diligent search of all available records relating to the matters referred to in the Complaint in this lawsuit. Pond5 has yet to complete its investigation and discovery of the

POND5'S ANSWERS AND RESPONSES TO  
PLAINTIFF'S FIRST INTERROGATORIES AND  
REQUESTS FOR PRODUCTION - I  
(3:15-cv-05696 RBL)

LAW OFFICES OF  
NICOLL BLACK & FEIG PLLC  
1325 FOURTH AVENUE  
SUITE 1650  
SEATTLE, WASHINGTON 98101  
(206) 838-7555

1 facts pertaining to this action or its preparation for trial, and therefore reserves its rights to  
2 amend, modify, or supplement the objections or responses, if necessary, at a later date.

3 2. In providing the following responses, Pond5 does not waive, but rather intends  
4 to preserve the following:

5 a. all objections as to competency, relevancy, materiality and admissibility;  
6 b. the right to object on any ground to the use or admissibility of the  
7 responses herein or documents produced by Pond5 in any subsequent proceedings including  
8 the trial of this or any other action;

9 c. all objections as to vagueness and ambiguity; and

10 d. the right to object on any ground to any further discovery requests  
11 propounded by plaintiff.

12 3. Pond5 objects to each Interrogatory or Request for Production to the extent it  
13 seeks information or documents protected against disclosure by the attorney-client privilege,  
14 work product doctrine, joint defense privilege, and any other judicially recognized protection  
15 or privilege.

16 4. Pond5 objects to plaintiff's discovery requests to the extent that they seek to  
17 impose obligations on Pond5 to produce a privilege log in excess of the obligation imposed by  
18 Rule 26(b)(5). Pond5 will produce a privilege log that lists all pre-litigation documents which  
19 Pond5 is withholding pursuant to a privilege claim. Pond5 will not, however, include in its  
20 privilege log any post-litigation work product and attorney-client communications generated  
21 after the commencement of litigation because, if it did so, Pond5 would need to log its entire  
22 litigation file, which would be unduly burdensome and not reasonably calculated to lead to the  
23 discovery of admissible evidence. *See Grider v. Keystone Health Plant Central, Inc.*, 580 F.3d  
24 119, 139 n. 22 (3d Cir. 2009); *Hernandez v. Best Buy Co., Inc.*, 2014 WL 5454505, at \*10  
25 (S.D. Cal. 2014); *U.S. v. Bouchard Transp.*, 2010 WL 1529248, at \*2 (E.D.N.Y. 2010); *Ryan*  
26 *Inv. Corp. v. Pedregal de Cabo San Lucas*, 2009 WL 5114077, at \*3 (N.D. Cal. 2009).

1           5.       Pond5 objects to each Interrogatory or Request for Production to the extent it  
2 seeks information or documents the production of which would violate any constitutional,  
3 statutory or common law privacy right of any entity, including Pond5, Inc.; any confidentiality  
4 agreement between Pond5, Inc. and any entity or any court order restricting the disclosure of  
5 information; or would result in the disclosure of confidential commercial information, trade  
6 secrets, proprietary information or other sensitive business information of Pond5, Inc. or other  
7 entities.

8           6.       Pond5 objects to each Interrogatory or Request for Production to the extent it  
9 seeks information or documents regarding “each,” “all,” “every,” or “any” on the grounds that  
10 it is overly broad and unduly burdensome. Pond5 has used reasonable diligence to provide  
11 documents based on an examination of those files that may reasonably be expected to contain  
12 responsive documents.

13           7.       Pond5 objects to each Interrogatory or Request for Production to the extent that  
14 it seeks information or documents to which plaintiff has equal or greater access.

15           8.       Pond5 objects to the definition of “document” as overly broad, unduly  
16 burdensome, and beyond the scope of the Rules of Civil Procedure to the extent it purports to  
17 apply to information that is protected by the attorney client privilege or other applicable  
18 privilege.

19           9.       Pond5 objects to all of plaintiff’s instructions to the extent that they are vague,  
20 ambiguous, overly broad, unduly burdensome, and inconsistent with the applicable Rules of  
21 Civil Procedure. The manner and method of Pond5’s objections and responses herein,  
22 including without limitation the scope of the documents that may be subject to production and  
23 the persons or other entities from whom production may be required, and Pond5’s rights and  
24 obligations concerning any duty to supplement, any documents withheld under claim of  
25 privilege, and the time period relevant to any duty to produce, are governed solely by the  
26

1 applicable Federal Rules of Civil Procedure and not the instructions set forth in plaintiff's  
2 discovery requests.

### 3 **INTERROGATORIES AND REQUESTS FOR PRODUCTION**

4 **INTERROGATORY NO. 1:** Identify all Customers who downloaded Gordon  
5 Hempton's copyrighted works of authorship from January 1, 2012 to the present. Identify and  
6 describe with particularity all efforts to recall Mr. Hempton's material or otherwise respond to  
7 your knowledge that Mr. Hempton did not authorize the use of his works.

8 **ANSWER:** Pond5 objects to Interrogatory No. 1 because it is overly broad, unduly  
9 burdensome, seeks information not relevant to this lawsuit, and is not reasonably calculated to  
10 lead to the discovery of admissible evidence. It also seeks confidential and proprietary  
11 information, which would not be adequately protected under a confidentiality agreement. The  
12 identity of Defendants' Customers has no relevance whatsoever to this lawsuit and plaintiff's  
13 request for such information is intended to annoy, harass, or embarrass the defendants.  
14 Additionally, Pond5 objects because Interrogatory No. 1 is compound. Without waiving  
15 objections, to date, despite requests from Pond5, plaintiff has not specifically identified which  
16 "copyrighted works of authorship" he contends were uploaded to the Pond5 website. As such,  
17 Pond5 is unable to answer Interrogatory No. 1. However, immediately upon being notified by  
18 plaintiff's attorney that user ckennedy342 had allegedly uploaded content that was owned by  
19 plaintiff, Pond5 removed all content uploaded by that user and blacklisted his account.

20  
21 **INTERROGATORY NO. 2:** Identify all Contributors who uploaded Plaintiff's  
22 copyrighted works of authorship. Identify and describe with particularity all efforts to recall  
23 Mr. Hempton's material or otherwise respond to Mr. Hempton's assertion that he did not  
24 authorize the use of his works.

25 **ANSWER:** Pond5 objects to Interrogatory No. 2 because it is overly broad, unduly  
26 burdensome, seeks information not relevant to this lawsuit, and is not reasonably calculated to

1 policy which specifically relate to the allegations made in this lawsuit. See PON 000032-118.  
2 Pond5 will supplement this response if additional responsive documents are located.  
3

4 **REQUEST FOR PRODUCTION NO. 3:** Please provide a complete accounting of  
5 the history of Gordon Hempton's copyrighted sound files on Pond5, including which files have  
6 been downloaded, when they were downloaded and/or purchased, who downloaded and/or  
7 purchased them (including name, username, IP addresses, identity, location, business for whom  
8 the Contributor was an agent, paypal username, paypal payment data information available to  
9 Pond5), as well as how much the Contributor paid to download each file.

10 **RESPONSE:** Pond5 objects to Request for Production Number 3 because it requests  
11 that Pond5 "provide a complete accounting," which is beyond the scope of FRCP 34.  
12 Additionally, as previously stated, Pond5 does not know what "Gordon Hempton's copyrighted  
13 sound files" are. Without waiving objections, Pond5 has no responsive documents.  
14

15 **REQUEST FOR PRODUCTION NO. 4:** Please provide all documents related to  
16 Pond5 user ckennedy342, including but not limited to his/her/its name, identity, address,  
17 IP address, history of uploads, paypal payment data, any associated usernames or other  
18 username(s) that Pond5 knows or suspects of being the same actual person/entity as  
19 ckennedy342 or in any way associated with ckennedy342.

20 **RESPONSE:** Pond5 objects to Request for Production No. 4 because it seeks  
21 documents that are subject to the attorney-client privilege and work product doctrine. See also  
22 General Objection #4. Pond5 will produce a privilege log for all pre-litigation documents.  
23 Without waiving objections, please see PON 000143 and PON 000144-228. Pond5 is  
24 continuing to investigate this matter and will likely supplement this response.  
25  
26

1       **REQUEST FOR PRODUCTION NO. 5:** Please provide all documents related to  
2 Pond5's attempt to identify the Contributor ckennedy342 and terminate ckennedy342's  
3 account.

4       **RESPONSE:** Pond5 objects to Request for Production No. 5 because it is duplicative  
5 of Request for Production No. 4. Without waiving objections, see response to Request for  
6 Production No. 4.

7  
8       **REQUEST FOR PRODUCTION NO. 6:** Please provide all documents and  
9 information received by Pond5 from the user ckennedy342.

10       **RESPONSE:** Pond5 objects to Request for Production No. 6 because it is duplicative  
11 of Request for Production No. 4. Pond5 further objects because a request for "information" is  
12 beyond the scope of FRCP 34. Without waiving objections, see response to Request for  
13 Production No. 4.

14  
15       **REQUEST FOR PRODUCTION NO. 7:** Please provide all documents and  
16 information received by Pond5 from any user who uploaded or downloaded Gordon  
17 Hempton's works.

18       **RESPONSE:** Pond5 objects to Request for Production No. 7 because a request for  
19 "information" is beyond the scope of FRCP 34. Without waiving objection, Pond5 is unaware  
20 of any responsive documents because it does not know what are, or are alleged to be, "Gordon  
21 Hempton's works."

22  
23       **REQUEST FOR PRODUCTION NO. 8:** Please produce all documents related to  
24 any other lawsuits, claims and/or settlements against or involving Pond5 related to any  
25 allegation that Pond5 sold, hosted, licensed or made available to third parties on Pond5's  
26 website without authorization by the author, owner, licensor, licensee or copyright holder.

1       **REQUEST FOR PRODUCTION NO. 16:** Please produce all documents related to  
2 any efforts Pond5 has undertaken to contact Contributors who have downloaded and/or  
3 purchased Gordon Hempton's works.

4       **RESPONSE:** None. As stated in previous answers and responses, plaintiff has failed to  
5 sufficiently identify his "works."

6  
7       **REQUEST FOR PRODUCTION NO. 17:** Please produce all correspondence related  
8 to any claims that Gordon Hempton's works were uploaded or downloaded onto Pond5's  
9 system or servers without Mr. Hempton's authorization.

10       **RESPONSE:** Please see documents produced in Response to Request for Production  
11 No. 4.

12  
13       **REQUEST FOR PRODUCTION NO. 18:** Please produce any and all documents  
14 that related to your affirmative defenses asserted in your Answer in this lawsuit.

15       **RESPONSE:** Objection. Request for Production No. 18 is overly broad, unduly  
16 burdensome, and not reasonably calculated to lead to the discovery of relevant or admissible  
17 evidence. This request is an impermissible "catch-all" request. It would require that, with  
18 respect to every affirmative defense raised by Pond5, it produce every document that could  
19 "relate" to that defense. Additionally, this request fails to comply with FRCP 34 because it fails  
20 to describe "with reasonable particularity each item or category of items to be inspected."  
21 Additionally, FRCP 26 already requires Pond5 to show or describe all documents that Pond5  
22 may use to support its defenses. As a result, Request for Production No. 18 is, at least in part,  
23 cumulative. Without waiving objections, please see all documents disclosed in this matter by  
24 Pond5.



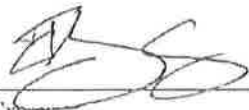
VERIFICATION BY PARTY

I, Tom Crary, declare and state as follows:

I am the Chief Financial Officer of Pond5, Inc. and as such, am authorized to make this verification on its behalf. I make this verification as an authorized representative of Pond5. I have read the foregoing answers to interrogatories, know the contents thereof, and believe the same to be true and correct to the best of my knowledge.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at New York, New York, this 21st day of January, 2016.

  
\_\_\_\_\_  
Tom Crary  
Chief Financial Officer  
Pond5, Inc.



**CERTIFICATION OF COUNSEL**

The undersigned attorneys for Defendant Pond5 have read the foregoing Plaintiff's First Interrogatories and Requests for Production of documents and the answers, responses and any objections thereto, and confirm that the answers, responses and any objections thereto are in compliance with Fed. R. Civ. P. 26(g).

**DATED** this 21st day of January, 2016.

NICOLL BLACK & FEIG PLLC



Curt H. Feig, WSBA # 19890  
Larry E. Altenbrun, WSBA #31475  
Attorneys for Defendant Pond5, Inc.

DECLARATION OF SERVICE

I, Jeanette Hendricks, hereby declare and state as follows:

I am a citizen of the United States and a resident of Seattle, Washington; I am over the age of eighteen years and not a party to the within action; my business address is Nicoll Black & Feig PLLC, 1325 Fourth Avenue, Suite 1650, Seattle, WA 98101.

On the date set forth below, I caused to be served:

- **DEFENDANT PONDS, INC.'S OBJECTIONS, ANSWERS AND RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION**

Attorneys for Plaintiff

Cynthia J. Heidelberg  
BRESKIN JOHNSON & TOWNSEND  
PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
206-652-8660  
Email: cheidelberg@bjtlegal.com

- ☐ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement

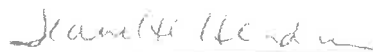
Nicholas E. D. Power  
LAW OFFICE OF NICHOLAS POWER  
540 Guard St., Ste 140  
Friday Harbor, WA 98250  
360-298-0464  
Email: nickedpower@gmail.com

- ☐ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement

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- ☐ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement

DATED this 21st day of January, 2016.



Jeanette Hendricks

PONDS'S ANSWERS AND RESPONSES TO  
PLAINTIFF'S FIRST INTERROGATORIES AND  
REQUESTS FOR PRODUCTION - 26  
(3:15-cv-05696 RBL)

LAW OFFICES OF  
NICOLL BLACK & FEIG PLLC  
1325 FOURTH AVENUE  
SUITE 1650  
SEATTLE, WASHINGTON 98101  
(206) 838-7555

# **EXHIBIT 3**

BRESKIN | JOHNSON | TOWNSEND PLLC

February 5, 2016

**SENT VIA MESSENGER**

Curt Feig  
Larry Altenbrun  
Nicoll Black & Feig PLLC  
1325 4<sup>TH</sup> Ave. Suite 1650  
Seattle, WA 98101

RECEIVED  
FEB 10 2016

NICOLL BLACK & FEIG, PLLC

*Re: Hempton v. Pond5, Inc. et al; Docs Produced*

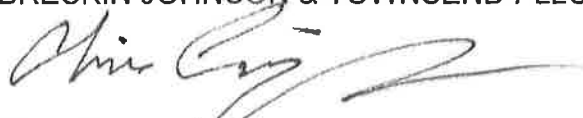
Dear Mr. Feig,

Attached to this letter, please find a USB disk containing Plaintiff's first document production (HEMP000001 – 000069). The production consists of copyrighted source audio belonging to our client, Mr. Hempton. We've created an index that includes the original name of the file with the corresponding bates for your convenience.

If you have any questions, feel free to contact me at [chris@bjtelgal.com](mailto:chris@bjtelgal.com) or 206 652-8660.

Sincerely,

BRESKIN JOHNSON & TOWNSEND PLLC



Chris Cunningham  
Legal Assistant

Enclosures (USB disk containing PLTF's Document Production)

# **EXHIBIT 4**

## Larry Altenbrun

---

**From:** Roger Townsend <rtownsend@bjtlegal.com>  
**Sent:** Monday, March 07, 2016 2:07 PM  
**To:** Larry Altenbrun  
**Cc:** Cindy Heidelberg; nick power; Curt Feig; Jeanette Hendricks; Jamie Telegin; Melissa Vizzare  
**Subject:** RE: Hempton v. Pond5 - Notice of 30(b)(6) Deposition

Larry:  
This is acceptable.

Thanks,  
Roger

---

**From:** Larry Altenbrun [mailto:laltenbrun@nicollblack.com]  
**Sent:** Friday, March 04, 2016 2:06 PM  
**To:** Roger Townsend <rtownsend@bjtlegal.com>  
**Cc:** Cindy Heidelberg <cheidelberg@bjtlegal.com>; nick power <nickedpower@gmail.com>; Curt Feig <cfeig@nicollblack.com>; Jeanette Hendricks <jhendricks@nicollblack.com>  
**Subject:** RE: Hempton v. Pond5 - Notice of 30(b)(6) Deposition

Roger:

It was a pleasure speaking to you this morning. Pursuant to our conversation, I have amended the proposed agreement to explicitly state that you can ask questions relating to the background of the FRCP 30(b)(6) designee and his knowledge of Pond5's background.

I understand that you are busy today but that you will review this over the weekend or on Monday morning, and will get back to me on Monday. It is important that we finalize an agreement by Monday so that my client and I can make appropriate plans for the March 22 deposition.

Finally, as a precaution, please confirm that you agree to strike the March 11 deposition. Obviously, we both anticipate finalizing the agreement that we have been discussing, but if for some reason we cannot reach a final agreement, we will need to re-set the date for a FRCP 30(b)(6) deposition to take place in New York (and we will need to conduct a meet and confer regarding the deposition topics). I presume that you are in agreement with this, but I don't want to be in a position where I am forced to file a motion for protective order at the last minute.

Here is the amended proposed agreement:

1. The plaintiff and defendant Pond5 (the "Parties") reach the following agreement for the purposes of facilitating an FRCP 30(b)(6) deposition of defendant that is limited to facts related to Pond5's defense under the Digital Millennium Copyright Act. The Parties understand that Pond5 plans to file a motion for summary judgment on this issue and this agreement is intended to promote case efficiency by allowing the plaintiff to discover facts related to the DMCA defense, limiting other discovery until the court has a reasonable opportunity to rule on the DMCA motion, and not prejudicing either party's right to conduct future discovery on other issues should the motion be denied or a ruling not issued in a timely manner. This agreement also promotes the goal of resolving discovery disputes amicably and without involvement of the court.

2. The Parties agree to hold an FRCP 30(b)(6) deposition in Seattle at the offices of Breskin Johnson & Townsend on Tuesday, March 22, beginning at 9 a.m.
3. The March 22 deposition will be limited to issues associated with topic #25 identified in plaintiff's amended notice of deposition dated February 10, 2016. The Parties understand and agree that facts reasonably related to Pond5's defense under the Digital Millennium Copyright Act (DMCA) will be the subject of this deposition. The parties further understand that the plaintiff is entitled to inquire into the designee's background and his or her personal knowledge of the background of Pond5.
4. Pond5 will supplement its written discovery responses no later than Friday, March 11.
5. From the date of this agreement until June 13, 2016, the parties agree that no further discovery of each other will be conducted, with the exception that Pond5 shall be entitled to submit a set of interrogatories and requests for production, which plaintiff shall answer, respond to, or object to within 45 days.
6. In the event that Pond5's motion is denied or the court has not issued a ruling on the motion by June 13, 2016, discovery will re-commence without limitation.
7. If discovery re-commences, a second FRCP 30(b)(6) deposition of Pond5 shall take place in New York on Wednesday, June 29. Defendant shall provide any objections to the second 30(b)(6) deposition no later than Monday, April 25. Thereafter, the parties shall work in good faith towards resolving any differences before involving the court.
8. Plaintiff's deposition shall take place in Seattle beginning at 9 a.m. on Friday, July 1 at the offices of Nicoll Black & Feig.
9. The Parties do not anticipate that this agreement will result in the need to seek an extension of any case deadlines. However, the Parties specifically acknowledge that this agreement is not intended to prevent either Party from conducting whatever discovery it deems necessary. The Parties will work in good faith to complete discovery within the existing deadlines and, if the circumstances so warrant, will work in good faith to agree upon reasonable extensions of discovery deadlines.
10. The Parties agree to be bound by this agreement so long as counsel for both parties agree to it by email acknowledging approval.

I look forward to hearing from you.

Best Regards,

Larry E. Altenbrun  
Nicoll Black & Feig PLLC  
1325 Fourth Ave., Suite 1650  
Seattle, WA 98101  
P: 206-838-7541  
C: 206-920-5369  
F: 206-838-7515

Notice: This communication, including attachments, may contain information that is confidential and protected by the attorney/client or other privileges. If the reader or recipient of this communication is not the intended recipient or you believe that you have received this communication in

# **EXHIBIT 5**



THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GORDON HEMPTON,

Plaintiff,

v.

POND5, INC., A DELAWARE  
CORPORATION; AND POND5 USER  
CKENNEDY342, A CORPORATION OR  
INDIVIDUAL OF TYPE UNKNOWN,

Defendants.

No.: 3:15-cv-05696-RBL

PLAINTIFF'S FIRST  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION OF DOCUMENTS  
**AND DEFENDANT POND5'S FIRST**  
**SUPPLEMENTAL OBJECTIONS,**  
**ANSWERS AND RESPONSES**  
**THERE TO**

COMES NOW Defendant Pond5, Inc. ("Pond5") and, pursuant to the Federal Rules of Civil Procedure, provides the following supplemental objections, answers, and responses to Plaintiff's First Interrogatories and Requests for Production.

**GENERAL OBJECTIONS**

Pond5 hereby incorporates the following General Objections into each and every individual response contained herein and into any future amendment, supplement or modification to these responses, as well as any future discovery request of the plaintiff.

1. Pond5's responses and objections are based upon information and belief after a reasonably diligent search of all available records relating to the matters referred to in the Complaint in this lawsuit. Pond5 has yet to complete its investigation and discovery of the

POND5'S FIRST SUPPLEMENTAL ANSWERS AND RESPONSES  
TO PLAINTIFF'S FIRST INTERROGATORIES AND  
REQUESTS FOR PRODUCTION - I  
(3:15-cv-05696 RBL)

LAW OFFICES OF  
NICOLL BLACK & FEIG PLLC  
1325 FOURTH AVENUE  
SUITE 1650  
SEATTLE, WASHINGTON 98101  
(206) 838-7555

1 facts pertaining to this action or its preparation for trial, and therefore reserves its rights to  
 2 amend, modify, or supplement the objections or responses, if necessary, at a later date.

3 2. In providing the following responses, Pond5 does not waive, but rather intends  
 4 to preserve the following:

5 a. all objections as to competency, relevancy, materiality and admissibility;  
 6 b. the right to object on any ground to the use or admissibility of the  
 7 responses herein or documents produced by Pond5 in any subsequent proceedings including  
 8 the trial of this or any other action;

9 c. all objections as to vagueness and ambiguity; and

10 d. the right to object on any ground to any further discovery requests  
 11 propounded by plaintiff.

12 3. Pond5 objects to each Interrogatory or Request for Production to the extent it  
 13 seeks information or documents protected against disclosure by the attorney-client privilege,  
 14 work product doctrine, joint defense privilege, and any other judicially recognized protection  
 15 or privilege.

16 4. Pond5 objects to plaintiff's discovery requests to the extent that they seek to  
 17 impose obligations on Pond5 to produce a privilege log in excess of the obligation imposed by  
 18 Rule 26(b)(5). Pond5 will produce a privilege log that lists all pre-litigation documents which  
 19 Pond5 is withholding pursuant to a privilege claim. Pond5 will not, however, include in its  
 20 privilege log any post-litigation work product and attorney-client communications generated  
 21 after the commencement of litigation because, if it did so, Pond5 would need to log its entire  
 22 litigation file, which would be unduly burdensome and not reasonably calculated to lead to the  
 23 discovery of admissible evidence. *See Grider v. Keystone Health Plant Central, Inc.*, 580 F.3d  
 24 119, 139 n. 22 (3d Cir. 2009); *Hernandez v. Best Buy Co., Inc.*, 2014 WL 5454505, at \*10  
 25 (S.D. Cal. 2014); *U.S. v. Bouchard Transp.*, 2010 WL 1529248, at \*2 (E.D.N.Y. 2010); *Ryan*  
 26 *Inv. Corp. v. Pedregal de Cabo San Lucas*, 2009 WL 5114077, at \*3 (N.D. Cal. 2009).

1           5.       Pond5 objects to each Interrogatory or Request for Production to the extent it  
2 seeks information or documents the production of which would violate any constitutional,  
3 statutory or common law privacy right of any entity, including Pond5, Inc.; any confidentiality  
4 agreement between Pond5, Inc. and any entity or any court order restricting the disclosure of  
5 information; or would result in the disclosure of confidential commercial information, trade  
6 secrets, proprietary information or other sensitive business information of Pond5, Inc. or other  
7 entities.

8           6.       Pond5 objects to each Interrogatory or Request for Production to the extent it  
9 seeks information or documents regarding “each,” “all,” “every,” or “any” on the grounds that  
10 it is overly broad and unduly burdensome. Pond5 has used reasonable diligence to provide  
11 documents based on an examination of those files that may reasonably be expected to contain  
12 responsive documents.

13           7.       Pond5 objects to each Interrogatory or Request for Production to the extent that  
14 it seeks information or documents to which plaintiff has equal or greater access.

15           8.       Pond5 objects to the definition of “document” as overly broad, unduly  
16 burdensome, and beyond the scope of the Rules of Civil Procedure to the extent it purports to  
17 apply to information that is protected by the attorney client privilege or other applicable  
18 privilege.

19           9.       Pond5 objects to all of plaintiff’s instructions to the extent that they are vague,  
20 ambiguous, overly broad, unduly burdensome, and inconsistent with the applicable Rules of  
21 Civil Procedure. The manner and method of Pond5’s objections and responses herein,  
22 including without limitation the scope of the documents that may be subject to production and  
23 the persons or other entities from whom production may be required, and Pond5’s rights and  
24 obligations concerning any duty to supplement, any documents withheld under claim of  
25 privilege, and the time period relevant to any duty to produce, are governed solely by the  
26

1 applicable Federal Rules of Civil Procedure and not the instructions set forth in plaintiff's  
2 discovery requests.

### 3 INTERROGATORIES AND REQUESTS FOR PRODUCTION

4 **INTERROGATORY NO. 1:** Identify all Customers who downloaded Gordon  
5 Hempton's copyrighted works of authorship from January 1, 2012 to the present. Identify and  
6 describe with particularity all efforts to recall Mr. Hempton's material or otherwise respond to  
7 your knowledge that Mr. Hempton did not authorize the use of his works.

8 **ANSWER:** Pond5 objects to Interrogatory No. 1 because it is overly broad, unduly  
9 burdensome, seeks information not relevant to this lawsuit, and is not reasonably calculated to  
10 lead to the discovery of admissible evidence. It also seeks confidential and proprietary  
11 information, which would not be adequately protected under a confidentiality agreement. The  
12 identity of Pond5's customers has no relevance whatsoever to this lawsuit and plaintiff's  
13 request for such information is intended to annoy, harass, or embarrass the defendants.  
14 Additionally, Pond5 objects because Interrogatory No. 1 is compound. Finally, Pond5 objects  
15 to the phrase: "all efforts to recall Mr. Hempton's material or otherwise respond to your  
16 knowledge that Mr. Hempton did not authorize the use of his works." That phrase is vague,  
17 undefined, and confusing, and may seek information or communications that are protected by  
18 the attorney-client privilege or work product doctrine.

19 Without waiving objections, to date, despite requests from Pond5, plaintiff has not  
20 produced significant evidence demonstrating which, if any, of his "copyrighted works of  
21 authorship" were uploaded to the Pond5 website. As such, defendant cannot identify the  
22 customers that downloaded those works.

23 On February 5, 2016, plaintiff produced HEMP000001-000069, which consists of 69  
24 audio files totaling over 42 hours of audio content. The production was described as  
25 "copyrighted source audio belonging to our client." Plaintiff has made no allegation that the  
26 production consists of audio files that were improperly uploaded to Pond5.com. Nor has the

1 plaintiff identified portions of the files that he contends were improperly uploaded. Moreover,  
2 the audio files disclosed as HEMP000001-000069 are significantly longer than all but a few of  
3 the clips uploaded by user ckennedy342. Based upon plaintiff's assertions, the massive volume  
4 of material disclosed, and the length of the audio files produced, it appears as though  
5 HEMP000001-000069 is simply a disclosure of a significant portion (perhaps all) of the library  
6 of audio works that plaintiff has created over the past many years. Plaintiff has made no effort  
7 to correlate that library of works to the allegations set forth in the complaint, to clips that were  
8 uploaded by ckennedy342, or to audio clips uploaded by any other Contributor to the Pond5  
9 website.

10 Pond5 does not have a legal obligation to analyze plaintiff's voluminous production of  
11 42+ hours of audio content and inform plaintiff of any possible infringements. The burden of  
12 proving the claims asserted in the lawsuit rests upon the plaintiff.

13 To the extent that HEMP000001-000069 contains audio that might have been  
14 improperly uploaded by ckennedy342, it appears that, to the extent that any infringement  
15 occurred, ckennedy342 may have cut clips from one or more of the larger audio files disclosed.  
16 Pond5 does not have the ability to compare the much larger audio files produced by plaintiff to  
17 shorter clips that were uploaded by ckennedy342. Moreover, as discussed above, Pond5 has no  
18 legal obligation to do so.

19 In the complaint, at paragraph 72, plaintiff identifies 9 clips that were allegedly posted  
20 by ckennedy342 and that were allegedly owned by the plaintiff. Pond5 is unaware of any other  
21 notice, whether pre-litigation or in the discovery process, where plaintiff has identified clips  
22 allegedly posted by ckennedy342 or any other Pond5 contributor that were allegedly owned by  
23 the plaintiff. Additionally, with respect to the nine clips alleged in the complaint, plaintiff has  
24 never produced evidence that allows Pond5 to reasonably compare the clips in question with  
25 files uploaded onto the Pond5 website and reach a conclusion as to whether the material is, in  
26 fact, infringing. With respect to the nine clips in question, Pond5 has compared their names to

the names of the 10,243 clips that were uploaded by ckennedy342. Through that comparison, Pond5 has identified clips that contain a substantially similar name to the ones identified in the complaint. Pond5 notes that several of the names were not exact matches and some of the upload dates appear to be incorrectly stated in the complaint. A summary of this comparison is provided below:

Name in Complaint	Alleged Download Date	Possible Match	Download Date	Clip ID
Thunder Moderately Distant	9/10/2014	Thunder Moderately Distant (1)	9/10/2014	41616044
		Thunder Moderately Distant (2)	9/10/2014	41616068
Coyote Solo	9/22/2014	Coyote Solo	9/22/2014	41867579
Desert Bird Wing Flutters	9/22/2014	Desert Bird Wings Flutter	9/22/2014	41868559
Desert Morning Bird Chorus (3)	9/22/2014	Desert Morning Bird Chorus (1)	9/22/2014	41868734
		Desert Morning Bird Chorus (2)	9/22/2014	41868731
		Desert Morning Bird Chorus (3)	9/22/2014	41868734
Prairie Quiet	11/30/14	Prairie Quiet Faint Insects Birds	11/30/14	44444836
Faint Insects Birds	11/30/14	<i>See above</i>		
Red-Tailed Hawk	11/30/14	Prairie Red-Tailed Hawk	11/30/14	44444837
Windy Grass Wispy Breeze	11/30/14	Wind Grass Wispy Breeze	9/14/2014	41736427
Prairie Wind Buffeting Faint Crickets	12/4/2014	Prairie Wind Buffeting Faint Crickets	12/1/2014	44445399

Assuming that the above “possible matches” are correct, there were a total of 43 sales of the above clips. Those sales resulted in revenue to Pond5 totaling \$192.95. Pond5 does not admit that the clips identified above were infringing. As noted above, to date, plaintiff has still not produced sufficient evidence for Pond5 to conduct the analysis necessary to reach such a conclusion.

Pond5 is uncertain as to the meaning of the phrase: “efforts to recall Mr. Hempton’s material or otherwise respond to your knowledge that Mr. Hempton did not authorize the use



1 of his works.” To the extent that this refers to contact with its customers, Pond5 has not  
2 contacted any of its customers with respect to the allegations made by Mr. Hempton. Pond5 is  
3 unaware of any legal obligation to do so. With respect to Pond5’s response to Mr. Hempton’s  
4 allegations, upon being notified, Pond5 immediately removed all content uploaded by  
5 ckennedy342 and blacklisted his account. Pond5 subsequently conducted a thorough  
6 investigation of ckennedy342, sharing the results of its investigation with plaintiff. Pond5 also  
7 had numerous communications with plaintiff and his attorney.

8  
9 **INTERROGATORY NO. 2:** Identify all Contributors who uploaded Plaintiff’s  
10 copyrighted works of authorship. Identify and describe with particularity all efforts to recall  
11 Mr. Hempton’s material or otherwise respond to Mr. Hempton’s assertion that he did not  
12 authorize the use of his works.

13 **ANSWER:** Pond5 objects to Interrogatory No. 2 because it is overly broad, unduly  
14 burdensome, seeks information not relevant to this lawsuit, and is not reasonably calculated to  
15 lead to the discovery of admissible evidence. Additionally, Pond5 objects because  
16 Interrogatory No. 2 is compound. Pond5 further objects because portions of Interrogatory No. 2  
17 are duplicative of Interrogatory No. 1. Finally, Pond5 objects to the phrase “works of  
18 authorship” as the phrase is vague and undefined. Without waiving objections, see objections  
19 and answer to Interrogatory No. 1. Pond5 does not know whether contributor ckennedy342  
20 uploaded plaintiff’s works and is aware of no other Contributor that uploaded his works.

21  
22 **INTERROGATORY NO. 3:** Identify and describe with particularity all methods in  
23 place at Pond5 from January 1, 2012 to the present to detect against the uploading,  
24 downloading, display, copying or distribution of works of authorship without authorization  
25 from the copyright owner or other party with authority to license the content.

1           **REQUEST FOR PRODUCTION NO. 7:** Please provide all documents and  
 2 information received by Pond5 from any user who uploaded or downloaded Gordon  
 3 Hempton's works.

4           **RESPONSE:** Pond5 objects to Request for Production No. 7 because a request for  
 5 "information" is beyond the scope of FRCP 34. Pond5 also objects to Request for Production  
 6 No. 7 because it is overbroad, unduly burdensome and not reasonably calculated to lead to the  
 7 discovery of admissible evidence. Without waiving objections, to date, plaintiff has still not  
 8 produced evidence demonstrating that anyone uploaded or downloaded any of his works from  
 9 Pond5's website. As such, defendant is unaware of responsive documents. Pond5 has,  
 10 nonetheless, disclosed all responsive documents pertaining to user ckennedy342.

11  
 12           **REQUEST FOR PRODUCTION NO. 9:** Please produce all documents related to  
 13 efforts that Pond5 takes or has taken in the past to detect unauthorized use of files and/or  
 14 Contributors who are uploading files without proper authorization, including any internal  
 15 protocols, detection software, third-party studies or research regarding the nature or extent of  
 16 pirated files on Pond5, Pond5's exposure and/or liability related to such files, and any  
 17 efforts/mechanisms/tools that Pond5 could employ to identify and/or combat piracy and/or  
 18 copyright infringement.

19           **RESPONSE:** Pond5 objects to Request for Production No. 9 to the extent that it seeks  
 20 its communications involving detection of unauthorized use of specific files or specific  
 21 Contributors. The production of such communications would require a massive undertaking  
 22 and is overly broad and unduly burdensome. Pond5 also objects to the extent that this Request  
 23 for Production seeks documents that are protected by the attorney-client privilege or work  
 24 product doctrine. See attached privilege log. Without waiving objections, see PON 000295-  
 25 315.



VERIFICATION BY PARTY

I, Tom Crary, declare and state as follows:

I am the Chief Financial Officer of Pond5, Inc. and as such, am authorized to make this verification on its behalf. I make this verification as an authorized representative of Pond5. I have read the foregoing supplemental answers to interrogatories, know the contents thereof, and believe the same to be true and correct to the best of my knowledge.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at New York, New York, this 11<sup>th</sup> day of March, 2016.


  
\_\_\_\_\_  
Tom Crary  
Chief Financial Officer  
Pond5, Inc.

**CERTIFICATION OF COUNSEL**

The undersigned attorneys for Defendant Pond5 have read the foregoing Plaintiff's First Interrogatories and Requests for Production of documents and the supplemental answers, responses and any objections thereto, and confirm that the supplemental answers, responses and any objections thereto are in compliance with Fed. R. Civ. P. 26(g).

**DATED** this 11th day of March, 2016.

NICOLL BLACK & FEIG PLLC

  
Curt H. Feig, WSBA # 19890  
Larry E. Altenbrun, WSBA #31475  
Attorneys for Defendant Pond5, Inc.

DECLARATION OF SERVICE

I, Jeanette Hendricks, hereby declare and state as follows:

I am a citizen of the United States and a resident of Seattle, Washington; I am over the age of eighteen years and not a party to the within action; my business address is Nicoll Black & Feig PLLC, 1325 Fourth Avenue, Suite 1650, Seattle, WA 98101.

On the date set forth below, I caused to be served:

- PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND DEFENDANT POND5'S FIRST SUPPLEMENTAL OBJECTIONS, ANSWERS AND RESPONSES THERETO

Attorneys for Plaintiff

Cynthia J. Heidelberg  
BRESKIN JOHNSON & TOWNSEND  
PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
206-652-8660  
Email: cheidelberg@bjtlegal.com

- ☐ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement


Nicholas E. D. Power  
LAW OFFICE OF NICHOLAS POWER  
540 Guard St., Ste 140  
Friday Harbor, WA 98250  
360-298-0464  
Email: nickedpower@gmail.com

- ☐ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement

Roger M. Townsend  
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- ☐ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement

DATED this 11th day of March, 2016.



Jeanette Hendricks

POND5'S FIRST SUPPLEMENTAL ANSWERS AND RESPONSES  
TO PLAINTIFF'S FIRST INTERROGATORIES AND  
REQUESTS FOR PRODUCTION - 22  
(3:15-cv-05696 RBL)

LAW OFFICES OF  
NICOLL BLACK & FEIG PLLC  
1325 FOURTH AVENUE  
SUITE 1650  
SEATTLE, WASHINGTON 98101  
(206) 838-7555

# **EXHIBIT 6**

BRESKIN | JOHNSON | TOWNSEND PLLC

March 16, 2016

**SENT VIA EMAIL AND US MAIL**

March 16, 2016

Curt H. Feig and Larry E. Altenbrun  
Law Offices of Nicoll Black & Feig PLLC  
1325 Fourth Avenue, Suite 1650  
Seattle, WA 98010

***Re: Hempton v. Pond5 – Inadequate Discovery Response and Request for FRCP 37  
Conference***

Dear Larry:

I write to notify you of Plaintiff's objections to the adequacy of the responses supplied to Plaintiff's First Interrogatories and Requests for Production that we received from your office on Friday, March 11, 2015.

With an aim to keep things on track for the 30(b)(6) deposition on March 22 – and without waiving further objections – this letter focuses on the additional responses and production related to the DMCA safe harbor issue that are necessary for the deposition. It is clear we require further production and complete responses related to the safe harbor defense and prior to the deposition next Tuesday. Any valid concern that Pond5 may have is adequately addressed by this district standard protective order.

We respectfully request that you review your responses and the documents supplied in conjunction with Interrogatory 1. This interrogatory seeks clearly discoverable information within the broad constructs of FRCP 26. Pond5 does not deny that it has allowed the unauthorized upload of Mr. Hempton's life work, distributed that work to third parties for money, and now refuses to disclose its customers that have downloaded Mr. Hempton's copyrighted works of authorship. This is untenable. Mr. Hempton has every right to know who holds these pirated copies of his work for obvious issues that are germane to this case. We disagree with your conclusory notion that the identity of who downloaded Mr. Hempton's work is not relevant. Indeed, it is the very core of this case: Pond5 has allowed Mr. Hempton's work to be distributed to third parties who could themselves be distributing Mr. Hempton's work and compounding the harm to Mr. Hempton.

*Pond5 Discovery Deficiency Letter*

*March 16, 2016*

*Page 2 of 3*

Similarly, we object to your characterization regarding Interrogatory No. 1 that “all efforts to recall Mr. Hempton’s material or otherwise respond to your knowledge that Mr. Hempton did not authorize the use of his work” is somehow vague and undefined. If you are legitimately confused, then we can clarify. Again, Pond5 has distributed Mr. Hempton’s copyrighted works of authorship to third parties. What have you done about it? Have you contacted your customers to notify them of the infringement and requested that they return or destroy copies? Certainly this is the minimum action Pond5 would have taken to mitigate the damages in this matter. If your client has sat idly by for over a year to preserve its reputation at the expense of mitigate the damages to Mr. Hempton’s, then he has a right to know that.

I also object to Pond5’s incomplete response and production associated with Interrogatory No. 3. Pond5’s arbitrary limitation of the time period requested and decision to respond with only “current” methods to detect piracy is unwarranted and insufficient. Pond5 objects that the time period requested “significantly exceeds the dates in which ckennedy342 posted content.” But ckennedy342 posted content at least as far back as September 2014. Thus, Pond5’s methods for detecting piracy in 2014 through the present are relevant to the lawsuit and a full response and related production for this time period is required.

Likewise your response and production associated with Interrogatory 5 is insufficient. The extent of piracy on Pond5’s site, as well as Pond5’s investigation and actions are directly relevant to its claimed safe harbor defense. It is our expectation that Pond5 has significant weaknesses in its efforts to police piracy and is consciously or recklessly maintaining an illegitimate market for its own financial benefit. By way of example, in Pond5’s communication to Mr. Hempton, Pond5 has previously indicated that the geographic location associated with an IP address serves as an indicator of piracy. For example, an IP located in a country known for piracy or that is listed on the Department of Commerce’s Export Controlled or Embargoed Countries *should* have been a red flag for Pond5 when allowing the upload of thousands of documents.

With regard to Interrogatory No. 15, Plaintiff expects that the parties will finalize the sole remaining question regarding the protective order and will be able to sign and file it today or tomorrow, which was sent to you yesterday. Accordingly, Plaintiff expects that Pond5 produce the chart or table showing gross monthly revenue by 5PM EST Friday, March 18, 2016.

To the extent that Pond5 has any concerns about the confidentiality or propriety nature of the information produced, those concerns are adequately addressed by a protective order.

Pond5’s discovery deficiencies are of imminent concern and jeopardize whether we can go forward with the deposition on Tuesday, March 22. Please produce supplemental responses to these Interrogatories and supply a copy of all relevant documentary or physical evidence in the possession of your client or their agents by 5PM EST Friday, March 18, 2016. In the event that

*Pond5 Discovery Deficiency Letter*

*March 16, 2016*

*Page 3 of 3*

this cannot be accomplished, please make yourself available for a FRCP 37 conference today or first thing tomorrow. We can be available before or after business hours if necessary.

Sincerely,

BRESKIN JOHNSON & TOWNSEND PLLC

A handwritten signature in dark ink, appearing to read "Roger M. Townsend". The signature is fluid and cursive, with the first name "Roger" being more prominent.

Roger M. Townsend

# EXHIBIT 7



**NB&F**  

---

**NICOLL BLACK & FEIG**  

---

**ATTORNEYS**

March 17, 2016

**Larry E. Altenbrun**  
Direct Dial 206-838-7541  
Fax 206-838-7515  
laltenbrun@nicollblack.com

**VIA E-MAIL**

Roger M. Townsend  
Breskin Johnson & Townsend PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104

Re: *Hempton v. Pond5: Discovery Issues*

Dear Roger:

I write to address your letter dated March 16. In that letter, you stated concerns over the adequacy of four of Pond5's answers to interrogatories. You indicated that the focus of the letter was to address issues related to the DMCA defense necessary for the deposition scheduled for next week. Below, I address the issues raised in your letter. It remains our goal to reach a reasonable resolution to these issues.

Your letter objects to Pond5's answer to Interrogatory No. 1 because it failed to disclose customers that downloaded the plaintiff's copyrighted works of authorship and included an objection based upon vagueness. Your letter implies that your primary concern is that Pond5 describes any contact that it had with customers relating to plaintiff's allegations or other actions taken with respect to Pond5's alleged knowledge that plaintiff did not authorize the use of his work.

We believe that your concerns over Interrogatory No. 1 are adequately addressed in our supplemental answer. As we explained:

Pond5 is uncertain as to the meaning of the phrase: "efforts to recall Mr. Hempton's material or otherwise respond to your knowledge that Mr. Hempton did not authorize the use of his works." To the extent that this refers to contact with its customers, Pond5 has not contacted any of its customers with respect to the allegations made by Mr. Hempton. Pond5 is unaware of any legal obligation to do so. With respect to Pond5's response to Mr. Hempton's allegations, upon being notified, Pond5 immediately removed all content uploaded by ckennedy342 and blacklisted his account. Pond5 subsequently conducted a thorough investigation of ckennedy342, sharing the results of its investigation with plaintiff. Pond5 also had numerous communications with plaintiff and his attorney.

March 17, 2016  
Roger Townsend  
Page 2 of 3

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The foregoing paragraph explains that Pond5 has not contacted customers with respect to the plaintiff's allegation and reasonably describes the actions it took in response to the allegation. Pond5 has also disclosed numerous documents that provide additional information that might be responsive to this request.

With respect to the identity of customers, we dispute that Pond5 has been provided with requisite notice to reach any particular conclusion regarding whether any copyrighted work owned by your client was uploaded to Pond5's website or downloaded by any customer.

Pond5 was first made aware of an issue involving your client on May 26, 2015. Over the next several days, Pond5 repeatedly asked for additional information, culminating in the following email sent May 29:

As I wrote in my initial email, we can immediately remove any potentially fraudulent content and take swift action to make things right once we know the tracks / contributors in question, which is information your clients will have to provide us. At the risk of stating the obvious, Pond5 cannot locate your clients' intellectual property without being informed as to what they claim is theirs.

Pond5 did not hear from plaintiff or counsel until June 29, when it received a takedown letter (dated June 24) from Nick Power. The takedown letter failed to satisfy the DMCA because, without limitation, it did not identify the allegedly infringing material in a manner that was reasonably sufficient to permit Pond5 to locate the material. The letter identified user ckennedy342 as "the prime culprit" and stated that ckennedy342 "has uploaded thousands of files" owned by the plaintiff. However, the letter failed to identify the files by name or any other method that would allow Pond5 to identify them. In response to the letter of June 24 and despite its deficiencies, Pond5 removed all content uploaded by ckennedy342 and blacklisted his account. These actions were taken within one day of receipt of the deficient takedown notice.

Since June 24, 2015, despite the passing of nearly nine months and the filing of this litigation, the plaintiff has still not identified the "thousands of files" that were allegedly uploaded by ckennedy342, nor has the plaintiff identified any other contributor that plaintiff claims uploaded material owned by the plaintiff. The only evidence that the plaintiff has ever produced that identifies allegedly infringing material is a bare allegation in the complaint, which identifies nine clips that were allegedly posted by ckennedy342 and that were allegedly owned by the plaintiff. That evidence, standing alone, is insufficient for Pond5 to reach a conclusion that plaintiff's work was ever downloaded. Plaintiff has still not even produced a DMCA-compliant notice, let alone any other evidence that would allow Pond5 to reach a conclusion as to whether plaintiff's material has been downloaded.

While we do not believe that the plaintiff has produced evidence sufficient for Pond5 to reach a conclusion as to whether his work was downloaded, we also believe that this issue is likely moot for purposes of the DMCA motion and next week's deposition. As stated

March 17, 2016  
Roger Townsend  
Page 3 of 3

---

above, Pond5 has *not contacted any of its customers* with respect to plaintiff's claims. We are unaware of any element associated with the DMCA where the specific identity of possible customers would be relevant to the DMCA motion, especially in light of the fact that we have informed you that we did not contact any customers in response to plaintiff's claims.

With respect to Interrogatory No. 3, you object to Pond5's decision to limit the time requested to the present. You suggest that a fair compromise is to answer the interrogatory for the time period from 2014 to the present. We agree to this compromise and will supplement.

With respect to Interrogatory No. 5, Pond5 stands by its objections. Nonetheless, by Friday, Pond5 will supplement Request for Production No. 8 and No. 12, which will include substantial information associated with claims of infringement, DMCA notices, actions taken in response to claims of infringement, and settlements. We believe that these disclosures will provide you with the information that you are seeking, at least so far as the DMCA defense is concerned. We also note that, as explained in our supplemental answer to Interrogatory No. 12, Pond5 rarely "identifies" a file as being uploaded without authorization. Rather, Pond5 becomes aware of a possibility of an improper upload and, in many cases, takes precautionary action based upon that possibility.

With respect to Interrogatory No. 15, we will produce the referenced table as soon as the parties have agreed to and filed the protective order.

Best Regards,

NICOLL BLACK & FEIG PLLC

A handwritten signature in dark ink, appearing to read "Larry E. Altenbrun", written over a horizontal line.

Larry E. Altenbrun

# EXHIBIT 8

## Larry Altenbrun

---

**From:** Roger Townsend <rtownsend@bjtlegal.com>  
**Sent:** Sunday, April 10, 2016 12:17 PM  
**To:** Larry Altenbrun  
**Cc:** Curt Feig; Jeanette Hendricks; Kaye Smith; Cindy Heidelberg; Nick Power  
**Subject:** Hempton v. Pond5, Inc

Larry:

I wanted to follow up regarding discovery. As you will recall, we agreed that your client would produce certain documents (see 30(b)(6) dep transcript at page 141).

In addition, we respectfully request copies of the files maintained by your client which were uploaded by Ckennedy (*Id.* at 148:18-20). These are presumably easily accessible and have been obtained by your office.

Thank you for your attention to this.

Yours,  
Roger

Roger M. Townsend  
BRESKIN JOHNSON & TOWNSEND PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
Office: (206) 652-8660  
Direct: (206) 518-6200  
Fax: (206) 652-8290

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Pursuant to IRS Circular 230, please be advised that, to the extent this communication (and any attachments) contains any tax advice, it is not intended to be, and cannot be used, for purposes of avoiding penalties under the Internal Revenue Code.

---

**From:** Larry Altenbrun [<mailto:laltenbrun@nicollblack.com>]  
**Sent:** Thursday, April 07, 2016 7:42 PM  
**To:** Roger Townsend <rtownsend@bjtlegal.com>  
**Cc:** Curt Feig <[cfeig@nicollblack.com](mailto:cfeig@nicollblack.com)>; Jeanette Hendricks <[jhendricks@nicollblack.com](mailto:jhendricks@nicollblack.com)>; Kaye Smith <[KSmith@nicollblack.com](mailto:KSmith@nicollblack.com)>; Melissa Vizzare <[mvizzare@bjtlegal.com](mailto:mvizzare@bjtlegal.com)>; Jamie Telegin <[jtelegin@bjtlegal.com](mailto:jtelegin@bjtlegal.com)>; Cindy Heidelberg <[cheidelberg@bjtlegal.com](mailto:cheidelberg@bjtlegal.com)>; Nick Power <[nickedpower@gmail.com](mailto:nickedpower@gmail.com)>  
**Subject:** RE: Hempton v. Pond5, Inc. - ER 408 Communication

Good Evening Roger:

I just wanted to let you know that we have received the letter that you sent pursuant to the below email and we are considering your proposal. We will get back to you soon.

Best Regards,

Larry E. Altenbrun  
Nicoll Black & Feig PLLC  
1325 Fourth Ave., Suite 1650

# **EXHIBIT 9**

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GORDON HEMPTON,

Plaintiff,

v.

POND5, INC., A DELAWARE  
CORPORATION; AND POND5 USER  
CKENNEDY342, A CORPORATION OR  
INDIVIDUAL OF TYPE UNKNOWN,

Defendants.

No.: 3:15-cv-05696-RBL

PLAINTIFF'S FIRST  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION OF DOCUMENTS  
**AND DEFENDANT POND5'S THIRD  
SUPPLEMENTAL OBJECTIONS,  
ANSWERS AND RESPONSES  
THERE TO**

COMES NOW Defendant Pond5, Inc. ("Pond5") and, pursuant to the Federal Rules of Civil Procedure, provides the following supplemental objections, answers, and responses to Plaintiff's First Interrogatories and Requests for Production.

**GENERAL OBJECTIONS**

Pond5 hereby incorporates the following General Objections into each and every individual response contained herein and into any future amendment, supplement or modification to these responses, as well as any future discovery request of the plaintiff.

1. Pond5's responses and objections are based upon information and belief after a reasonably diligent search of all available records relating to the matters referred to in the Complaint in this lawsuit. Pond5 has yet to complete its investigation and discovery of the

POND5'S THIRD SUPPLEMENTAL ANSWERS AND RESPONSES  
TO PLAINTIFF'S FIRST INTERROGATORIES AND  
REQUESTS FOR PRODUCTION - I  
(3:15-cv-05696 RBL)

LAW OFFICES OF  
NICOLE BLACK & FEIG PLLC  
1525 FOURTH AVENUE  
SUITE 1650  
SEATTLE, WASHINGTON 98101  
(206) 838-7555

1 applicable Federal Rules of Civil Procedure and not the instructions set forth in plaintiff's  
2 discovery requests.

3 **REQUESTS FOR PRODUCTION**

4 **REQUEST FOR PRODUCTION NO. 1:** Please provide all documents related to  
5 Pond5 user ckennedy342, including but not limited to his/her/its name, identity, address,  
6 IP address, history of uploads, paypal payment data, any associated usernames or other  
7 username(s) that Pond5 knows or suspects of being the same actual person/entity as  
8 ckennedy342 or in any way associated with ckennedy342.

9 **RESPONSE:** Pond5 incorporates by reference its previous objections and responses  
10 to Request for Production No. 4. Additionally, please see PON 000530-538. Pond5 is also  
11 producing an updated privilege log.



**CERTIFICATION OF COUNSEL**

The undersigned attorneys for Defendant Pond5 have read the foregoing Plaintiff's First Interrogatories and Requests for Production of documents and the supplemental answers, responses and any objections thereto, and confirm that the supplemental answers, responses and any objections thereto are in compliance with Fed. R. Civ. P. 26(g).

**DATED** this 28<sup>th</sup> day of April, 2016.

NICOLL BLACK & FEIG PLLC



Curt H. Feig, WSBA # 19890  
Larry E. Altenbrun, WSBA #31475  
Attorneys for Defendant Pond5, Inc.

DECLARATION OF SERVICE

I, Jeanette Hendricks, hereby declare and state as follows:

I am a citizen of the United States and a resident of Seattle, Washington; I am over the age of eighteen years and not a party to the within action; my business address is Nicoll Black & Feig PLLC, 1325 Fourth Avenue, Suite 1650, Seattle, WA 98101.

On the date set forth below, I caused to be served:

• **PLAINTIFF'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND DEFENDANT POND5'S THIRD SUPPLEMENTAL OBJECTIONS, ANSWERS AND RESPONSES THERETO**

Attorneys for Plaintiff

Cynthia J. Heidelberg  
BRESKIN JOHNSON & TOWNSEND  
PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
206-652-8660  
Email: cheidelberg@bjtlegal.com

☐ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement  
without thumb drive PON 000530

Nicholas E. D. Power  
LAW OFFICE OF NICHOLAS POWER  
540 Guard St., Ste 140  
Friday Harbor, WA 98250  
360-298-0464  
Email: nickedpower@gmail.com

☐ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement  
without thumb drive PON 000530

Roger M. Townsend  
BRESKIN JOHNSON & TOWNSEND  
PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
206-652-8660  
Fax: 206-652-8290  
Email: rtownsend@bjtlegal.com  
mvizzare@bjtlegal.com  
admin@bjtlegal.com

☒ VIA HAND DELIVERY  
☐ VIA FACSIMILE  
☐ VIA U.S. MAIL  
☒ VIA E-MAIL per E-service Agreement  
with thumb drive PON 000530

DATED this 28th day of April, 2016.

  
Jeanette Hendricks

POND5'S THIRD SUPPLEMENTAL ANSWERS AND RESPONSES  
TO PLAINTIFF'S FIRST INTERROGATORIES AND  
REQUESTS FOR PRODUCTION - 6  
(3:15-cv-05696 RBL.)

LAW OFFICES OF  
NICOLL BLACK & FEIG PLLC  
1325 FOURTH AVENUE  
SUITE 1650  
SEATTLE, WASHINGTON 98101  
(206) 336-7552

# **EXHIBIT 10**

## Larry Altenbrun

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**From:** Roger Townsend <rtownsend@bjtlegal.com>  
**Sent:** Monday, June 06, 2016 9:53 AM  
**To:** Larry Altenbrun  
**Cc:** Curt Feig; Cindy Heidelberg; nick power  
**Subject:** RE: Hempton v. Pond5, Inc

Larry:  
We have not received the audio files you agreed to produce.

Please update me on this and where you are in the process.

Thank you,  
Roger

Roger M. Townsend  
BRESKIN JOHNSON & TOWNSEND PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
Office: (206) 652-8660  
Direct: (206) 518-6200  
Fax: (206) 652-8290

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Pursuant to IRS Circular 230, please be advised that, to the extent this communication (and any attachments) contains any tax advice, it is not intended to be, and cannot be used, for purposes of avoiding penalties under the Internal Revenue Code.

---

**From:** Larry Altenbrun [mailto:laltenbrun@nicollblack.com]  
**Sent:** Monday, May 02, 2016 11:16 AM  
**To:** Roger Townsend <rtownsend@bjtlegal.com>  
**Cc:** Curt Feig <cfeig@nicollblack.com>  
**Subject:** RE: Hempton v. Pond5, Inc

Hi Roger:

Before I pass this along to my clients for consideration, are you amenable to push the scheduled depositions back by a week or two? I don't mean to overcomplicate this, but we worked hard to get the motion filed so that there would at least be a chance that the court will rule before discovery re-commences.

Let me know.

Thanks,

Larry E. Altenbrun  
Nicoll Black & Feig PLLC  
1325 Fourth Ave., Suite 1650  
Seattle, WA 98101  
P: 206-838-7541

# **EXHIBIT 11**

**Larry Altenbrun**

---

**From:** Roger Townsend <rtownsend@bjtlegal.com>  
**Sent:** Thursday, July 14, 2016 9:21 AM  
**To:** Larry Altenbrun  
**Cc:** Curt Feig; nick power; Jeanette Hendricks; Roger Townsend; Cindy Heidelberg  
**Subject:** RE: Pond5 Litigation - Damages

Larry:

I will look at your discovery requests. I'm out the last week of July and first week of August, so keep that in mind in your scheduling.

REDACTED-ER 408

REDACTED-ER 408

We have calculated that there were 114 tracks downloaded for a total of 208 downloads (some tracks were downloaded more than once). I believe you should have a list of the names of the downloads, as they came from your client. REDACTED-ER 408

REDACTED-ER 408

There are two important discovery points which are outstanding and about which we need to meet and confer. Are you available on Friday morning at 10 am?

Specifically, we have the tracks from Ckenedy that you previously provided. However, it appears that the metadata was stripped from the files. Can you advise whether that was done by Pond5? If so, we need versions with the metadata included.

Additionally, please be advised that we need you to identify the individual end users who downloaded the tracks. We held off on discovery on this point in the hopes of settlement, which has passed.

Also, please include Cindy in your emails on this case.

Roger

# **EXHIBIT 12**

## Larry Altenbrun

---

**From:** Roger Townsend <rtownsend@bjtlegal.com>  
**Sent:** Tuesday, July 19, 2016 2:48 PM  
**To:** Larry Altenbrun  
**Cc:** Roger Townsend; nick power; Curt Feig; Cindy Heidelberg  
**Subject:** Hempton v. Pond5 Meet and Confer

Larry:

This follows up our meet and confer from today.

1. Metadata on Sound Files. I advised you that the metadata on the sound files has been removed. I can now clarify that the metadata was removed on April 21, 2016. The metadata is important to our investigation and prosecution of this matter and we need to understand what happened with these files and how the metadata came to be removed. You agreed to provide a statement on behalf of your client regarding the chain of evidence and treatment of those electronic files.
2. Discovery of Users. I advised that we needed you to identify (as such term is defined in the discovery requests) the end users that downloaded Gordon Hempton's copyrighted files. You asked for more information regarding the basis of our claim that the particular files were, in fact, Mr. Hempton's copyrighted works of authorship. We allege that the following files and data from Ckenedy/Mr. Kahn were infringement's of Mr. Hempton's copyrighted works:



<u>pond_user</u>	<u>objectid</u>	<u>Pond5 name</u>	<u>Hempton filename</u>
554434	41736427	Wind grass wispy breeze	QP02 0200 Wind grass wispy breeze.
554434	41868858	Desert morning bird chorus (3)	QP01 0131 Desert morning bird chor
554434	41386040	Owl Hoot	QP01 0060 Deciduous forest owl hoo
554434	44444837	Prairie red-tailed hawk	QP06 0647 Prairie red-tailed hawk.w
554434	41616044	Thunder moderately distant (1)	QP03 0279 Thunder moderately dista
554434	41868559	Desert bird wings flutter	QP01 0135 Desert bird wings flutter.v
554434	41867579	Coyote solo	QP01 0138 Coyote solo.wav
554434	41868481	Deciduous forest owl hoot	QP01 0060 Deciduous forest owl hoo
554434	41868731	Desert morning bird chorus (2)	QP01 0130 Desert morning bird chor
554434	44444836	Prairie quiet faint insects birds	QP06 0660 Prairie quiet faint insects
554434	44445399	Prairie wind buffeting faint crickets	QP06 0604 Prairie wind buffeting fair
554434	41869774	Rain soft	QP01 0011 Rain soft.wav
554434	41734694	Wind desert soft variable over flat lava bed	QP02 0247 Wind desert soft variable
554434	41737230	Wind modern light variable wires	QP02 0139 Wind modern light variab
554434	41691269	Wind plants gentle breeze soft leaf rustles	QP02 0161 Wind plants gentle breeze
554434	41869319	Ocean shore wave lap gull circles	QP01 0074 Ocean shore wave lap gu
554434	44261421	Prairie dawn chorus mourning dove (1)	QP06 0576 Prairie dawn chorus moun
554434	41869470	Prairie day wind crickets	QP01 0085 Prairie day wind crickets.v
554434	44445350	Prairie wind blustery crickets	QP06 0602 Prairie wind blustery crick
554434	41647142	River drumming in rocks waterfall	QP04 0408 River drumming in rocks v
554434	41892479	Stream moderate	QP01 0018 Stream moderate.wav
554434	41615922	Thunder distant	QP01 0009 Thunder distant.wav
554434	41615937	Thunder echo	QP03 0276 Thunder echo.wav
554434	41650473	Water drop	QP04 0335 Water drop.wav
554434	41690886	Wind deciduous forest breeze gentle insects	QP02 0184 Wind deciduous forest br
554434	41734901	Wind desert rock boulder space	QP02 0251 Wind desert rock boulder
554434	41734847	Wind desert variable complex swirling	QP02 0255 Wind desert variable com
554434	41736339	Wind grass winter brisk consistent	QP02 0212 Wind grass winter brisk co
554434	41691051	Wind palm frond soft gusty more distant	QP02 0246 Wind palm frond soft gus
554434	41691833	Wind plants whipping breeze stronger	QP02 0165 Wind plants whipping bre
554434	41691926	Wind reed light gusts stem action	QP02 0217 Wind reed light gusts ster
554434	41867016	Canyon owl	QP01 0128 Canyon owl.wav
554434	41867394	Coniferous forest ambience active	QP01 0063 Coniferous forest ambier
554434	41867258	Coniferous forest jay (1)	QP01 0071 Coniferous forest jay.wav
554434	41870040	Deciduous forest country morning	QP01 0046 Deciduous forest country
554434	41868545	Deciduous forest tufted titmouse solo	QP01 0052 Deciduous forest tufted t
554434	41868632	Desert mockingbird solo	QP01 0133 Desert mockingbird solo.v
554434	41869143	Insect crickets active	QP01 0029 Insect crickets active.wav
554434	41869213	Insect crickets isolated	QP01 0028 Insect crickets isolated.w
554434	44442581	Prairie crickets busy wind sweeping night (1)	QP06 0621 Prairie crickets busy wind
554434	44263959	Prairie dawn early	QP06 0567 Prairie early dawn.wav
554434	41869523	Prairie meadowlark chirps chortle	QP01 0087 Prairie meadowlark chirp
554434	44444959	Prairie western meadowlark (1)	QP06 0624 Prairie western meadowl
554434	44445494	Prairie wind gusting crickets	QP06 0601 Prairie wind gusting cricke
554434	44265505	Prairie wind soft breezy	QP06 0588 Prairie wind soft breezy.v
554434	44445896	Prairie wind sweeping meadowlark	QP06 0613 Prairie wind sweeping me
554434	41614061	Rain downpour	QP03 0301 Rain downpour.wav
554434	41615060	Rain quiet light tone	QP03 0292 Rain quiet light tone.wav

My client is currently traveling and will provide additional information regarding these infringements, but I wanted to give you this notice. As Pond5 has noted, Mr. Kahn did almost nothing to cover his tracks and did not even change the names of the files infringed from Mr. Hempton.

3. I advised that we intend to pursue relief from the court on these issues and avail ourselves of the court's process for telephonic hearing of discovery disputes. (Dkt. #29 at par. 3) I requested times on Thursday and Friday for calling the court.

Let me know if you have any questions or comments.

Best regards,  
Roger

Roger M. Townsend  
BRESKIN JOHNSON & TOWNSEND PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
Office: (206) 652-8660  
Direct: (206) 518-6200  
Fax: (206) 652-8290

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# **EXHIBIT 13**

## Larry Altenbrun

---

**From:** Larry Altenbrun  
**Sent:** Thursday, July 21, 2016 10:18 AM  
**To:** 'Roger Townsend'  
**Cc:** nick power; Curt Feig; Cindy Heidelberg  
**Subject:** RE: Hempton v. Pond5 Meet and Confer

Dear Roger:

I write to address the issues raised below and discussed during our telephone conference on Tuesday, July 19.

With respect to metadata, we are looking into this issue. It is our intent to provide you with any and all metadata that we have. I can confirm that there was no intention to remove metadata from any file as part of the discovery process. It is not yet clear to me whether metadata was unintentionally removed during the copying process, whether Pond5 maintains audio files without any metadata in the normal course of its business, or whether there is some other explanation. I have spent considerable time on this issue already and have had regular communications with Pond5. I hope to provide you with a detailed response to this issue by early next week.

With respect to the identity of end users, two days ago, for the very first time and after almost 16 months have elapsed since plaintiff first notified Pond5 of potential copyright issues, your client disclosed to us a list of files that he contends were uploaded by ckennedy342 and owned by Mr. Hempton. In that disclosure, the plaintiff also provided a column with "Hempton filename," in which he listed names of files that he contends are titles of Mr. Hempton's work corresponding to the titles given by ckennedy342.

In February, you disclosed HEMP000001-000069, which you stated were "copyrighted source audio belonging to our client." This disclosure includes 69 files, identified with an index provided by you that contains the "Wav File Name." The disclosure contains over 40 hours of audio. We have repeatedly informed you that the disclosure does not provide Pond5 with any reasonable method of comparing it to the files uploaded by ckennedy342 in order to determine which files uploaded by ckennedy342 were possibly owned by your client.

We have compared the list of Mr. Hempton's filenames from the table that you provided us Tuesday to the filenames set forth in the massive audio disclosure from February and none of the filenames appear to match. We have also sampled a small portion of the material and that process does not appear to result in matches to the uploads by ckennedy342. As such, the plaintiff has still not provided us with any reasonable method in which we can compare the uploads by ckennedy342 to work that is owned by the plaintiff. Your client has still not disclosed sufficient evidence to comply with the most fundamental requirement of the DMCA, which is proper notice pursuant to 17 USC 512(c)(3)(A). Moreover, the plaintiff has not produced sufficient evidence to establish a significant likelihood that there was any copyright violation, let alone a violation that is attributable to Pond5. In fact, by producing 40+ hours of "copyrighted source audio" that does not match the files that were allegedly illegally uploaded by ckennedy342, if anything, the evidence suggests that no such copyright violation occurred.

Until the plaintiff produces sufficient evidence that allows Pond5 to make a reasonable comparison between works that are owned by Mr. Hempton and those that were uploaded by ckennedy342, it is premature for you to ask for the identity of customers. The Interrogatories (numbers 1 & 8) that this relates to request that we identify customers that "have downloaded Gordon Hempton's works" or "downloaded Gordon Hempton's copyrighted works." At this time, there is an absence of evidence establishing what his works are and he has failed to provide us with any reasonable means of comparing his alleged work to those that were uploaded by ckennedy342.

If and when the plaintiff produces audio files that match those identified in the table that you sent to us on Tuesday, we will conduct a comparison and update our answers, responses, and objections to your discovery requests accordingly. We do not waive our right to argue that, even then, your request for the identity of customers is objectionable under various grounds. In fact, there is a high likelihood that we will object on the basis that the request is not reasonably calculated to lead to the discovery of admissible evidence and that the relevant information regarding sales, license terms, dates, etc. can be disclosed without providing the identity of customers. However, until you have at least provided us with actual audio files that match the titles from Tuesday's disclosure and we have a reasonable opportunity to conduct our own analysis, I cannot definitively take a position on this issue and it is premature for me to do so.

Best Regards,

Larry E. Altenbrun  
Nicol Black & Feig PLLC  
D: 206-838-7541  
C: 206-920-5369

---

**From:** Roger Townsend [mailto:rtownsend@bjtlegal.com]  
**Sent:** Tuesday, July 19, 2016 2:48 PM  
**To:** Larry Altenbrun  
**Cc:** Roger Townsend; nick power; Curt Feig; Cindy Heidelberg  
**Subject:** Hempton v. Pond5 Meet and Confer

Larry:

This follows up our meet and confer from today.

1. Metadata on Sound Files. I advised you that the metadata on the sound files has been removed. I can now clarify that the metadata was removed on April 21, 2016. The metadata is important to our investigation and prosecution of this matter and we need to understand what happened with these files and how the metadata came to be removed. You agreed to provide a statement on behalf of your client regarding the chain of evidence and treatment of those electronic files.
2. Discovery of Users. I advised that we needed you to identify (as such term is defined in the discovery requests) the end users that downloaded Gordon Hempton's copyrighted files. You asked for more information regarding the basis of our claim that the particular files were, in fact, Mr. Hempton's copyrighted works of authorship. We allege that the following files and data from Ckenedy/Mr. Kahn were infringement's of Mr. Hempton's copyrighted works:

# **EXHIBIT 14**

## Larry Altenbrun

---

**From:** Roger Townsend <rtownsend@bjtlegal.com>  
**Sent:** Friday, July 22, 2016 3:18 PM  
**To:** Larry Altenbrun  
**Cc:** nick power; Curt Feig; Cindy Heidelberg; Roger Townsend  
**Subject:** RE: Hempton v. Pond5 Meet and Confer

Larry:

Thank you for your email. We will look forward to your follow up on the metadata and production of the files with the metadata included.

Furthermore, we will follow up on our evidence of infringement. We do not think there is a reasonable dispute that the files on Pond5's system were Mr. Hempton's copyrighted works of authorship. However, because you dispute this contention, we will provide additional evidence that the files on Pond5 system were, in fact, infringing – some of which will be contained in the metadata that was apparently stripped from the files by defendants.

To be clear, you provide no legal basis why we cannot seek the identity of the end users who have downloaded our client's files and injunctive relief against those end users from further dissemination of our client's copyrighted works.

Finally, we are in receipt of your discovery requests to Mr. Hempton. We respectfully request an extension of time to respond to those requests for an additional 21 days. My client has been traveling on family vacation and simply will not have time to respond.

As you know, I am out of the office the next 2 weeks. During that time, please continue your discussion of these matters with Cindy and Nick.

Best regards,  
Roger

---

**From:** Larry Altenbrun [mailto:altenbrun@nicollblack.com]  
**Sent:** Thursday, July 21, 2016 10:18 AM  
**To:** Roger Townsend <rtownsend@bjtlegal.com>  
**Cc:** nick power <nickedpower@gmail.com>; Curt Feig <cfeig@nicollblack.com>; Cindy Heidelberg <cheidelberg@bjtlegal.com>  
**Subject:** RE: Hempton v. Pond5 Meet and Confer

Dear Roger:

I write to address the issues raised below and discussed during our telephone conference on Tuesday, July 19.

With respect to metadata, we are looking into this issue. It is our intent to provide you with any and all metadata that we have. I can confirm that there was no intention to remove metadata from any file as part of the discovery process. It is not yet clear to me whether metadata was unintentionally removed during the copying process, whether Pond5 maintains audio files without any metadata in the normal course of its business, or whether there is some other explanation. I have spent considerable time on this issue already and have had regular communications with Pond5. I hope to provide you with a detailed response to this issue by early next week.

With respect to the identity of end users, two days ago, for the very first time and after almost 16 months have elapsed since plaintiff first notified Pond5 of potential copyright issues, your client disclosed to us a list of files that he contends

# **EXHIBIT 15**



## Larry Altenbrun

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**From:** Larry Altenbrun  
**Sent:** Monday, July 25, 2016 2:06 PM  
**To:** nick power; Cindy Heidelberg  
**Cc:** Curt Feig; 'Roger Townsend'; Jeanette Hendricks  
**Subject:** RE: Hempton v. Pond5 Meet and Confer

Good Afternoon Cindy & Nick:

I understand that Roger is out of the office so I am sending this to you.

Initially, unfortunately, there are a few statements in the below email that I must dispute so that there cannot be any assumption that we concede these points.

The statement that there is not "a reasonable dispute that the files on Pond5's system were Mr. Hempton's copyrighted works of authorship" is simply not true. The plaintiff has never produced evidence for us to independently confirm which files were owned by him. In fact, last week was the very first time that the plaintiff has even shared a list with us that identified the material uploaded by ckennedy342 that he contends were owned by plaintiff. If you contend that we are supposed to know that some of the clips that were uploaded by ckennedy342 were owned by plaintiff, you need to identify that evidence that supports your assertion. As far as we can tell, the plaintiff simply has not produced this evidence. We also note that plaintiff and his attorneys have gone from alleging pre-complaint that ckennedy uploaded "thousands" of files that were owned by plaintiff to 138 files (complaint) to 114 files (mediation) to 87 files (table provided by counsel last week). We previously assumed that the plaintiff would have never filed this lawsuit if he could not produce evidence showing precisely what was copyrighted and what infringed those copyrights; we are no longer so sure of that and we are frustrated by your unwillingness or inability to share this evidence, especially when combined with an insistence that we should somehow have such knowledge.

I also disagree with the assertion that we haven't provided a legal basis for resisting efforts to provide you with the identity of end users. We have stated proper legal bases for this in our objections to discovery and we further described our legal position in written correspondence. It is my hope that this issue can be resolved amicably, but it is premature for us to take a formal position on the issue until you have provided a minimal amount of evidence supporting your claims.

To update you on the status of our efforts to retrieve metadata, it appears as though there might be metadata stored on the Amazon web servers that Pond5 utilizes. However, confirming that it does exist and obtaining the metadata are not simple tasks. Pond5 is working to identify and obtain whatever metadata exists. We will update you further on this issue when we have more information, which will be later this week.

Turning to Roger's request for a 21-day extension to respond to discovery, we cannot agree to that extension but we are willing to try to work with you to accommodate plaintiff's schedule. Initially, Roger's email is unclear as to whether the request applies to both sets of outstanding discovery or only the second set of written discovery. Currently, according to my calendar, the first set of discovery is due on August 12 and the second set of discovery is due August 22. The challenge to extending the response deadlines is that the plaintiff's deposition is set for August 24 and we need these responses prior to taking his deposition. An additional concern is that the expert disclosure deadline is currently set for September 28 and, as you can imagine, we need the plaintiff's deposition to decide whether expert testimony will be necessary and, if so, we would need sufficient time for the expert(s) to draft reports. The bottom line is that we cannot agree to a blanket 21-day extension. Nonetheless, we do want to accommodate the plaintiff. As such, we propose the following: (1) we agree to move the deadline for plaintiff to respond to both sets of discovery to Friday, September 2; (2) we move the plaintiff's deposition to Thursday, September 8; and (3) we stipulate to extend the expert disclosure

deadline to Tuesday, October 18. Please also note that, assuming you agree to this schedule, Pond5 does not waive its right to conduct other discovery during this period; time does not allow for us to put off other discovery in this matter. Please let me know if the foregoing is acceptable to you and your client. I am trying my best to accommodate the plaintiff's schedule, but such accommodations must not prejudice my client's rights.

I look forward to hearing from you.

Best Regards,

Larry



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**From:** Roger Townsend [mailto:rtownsend@bjtlegal.com]  
**Sent:** Friday, July 22, 2016 3:18 PM  
**To:** Larry Altenbrun  
**Cc:** nick power; Curt Feig; Cindy Heidelberg; Roger Townsend  
**Subject:** RE: Hempton v. Pond5 Meet and Confer

Larry:

Thank you for your email. We will look forward to your follow up on the metadata and production of the files with the metadata included.

Furthermore, we will follow up on our evidence of infringement. We do not think there is a reasonable dispute that the files on Pond5's system were Mr. Hempton's copyrighted works of authorship. However, because you dispute this contention, we will provide additional evidence that the files on Pond5 system were, in fact, infringing – some of which will be contained in the metadata that was apparently stripped from the files by defendants.

To be clear, you provide no legal basis why we cannot seek the identity of the end users who have downloaded our client's files and injunctive relief against those end users from further dissemination of our client's copyrighted works.

Finally, we are in receipt of your discovery requests to Mr. Hempton. We respectfully request an extension of time to respond to those requests for an additional 21 days. My client has been traveling on family vacation and simply will not have time to respond.

As you know, I am out of the office the next 2 weeks. During that time, please continue your discussion of these matters with Cindy and Nick.

Best regards,  
Roger

---

**From:** Larry Altenbrun [mailto:laltenbrun@nicollblack.com]  
**Sent:** Thursday, July 21, 2016 10:18 AM  
**To:** Roger Townsend <rtownsend@bjtlegal.com>  
**Cc:** nick power <nickedpower@gmail.com>; Curt Feig <cfeig@nicollblack.com>; Cindy Heidelberg <cheidelberg@bjtlegal.com>  
**Subject:** RE: Hempton v. Pond5 Meet and Confer

# **EXHIBIT 16**

1  
2  
3  
4  
5 **UNITED STATES DISTRICT COURT**  
6 **FOR THE WESTERN DISTRICT OF WASHINGTON**

7 GORDON HEMPTON, Plaintiff,

8  
9 v.

No. 3:15-cv -05696-RBL

10 POND5, a Delaware Corporation; and POND5  
11 USER CKENNEDY342, a corporation or  
12 individual of type unknown, Defendants.

**DECLARATION OF  
GORDON HEMPTON**

- 13  
14 1. I declare under penalty of perjury under the laws of the State of Washington  
that the following is true and correct.
- 15 2. My name is Gordon Hempton, I am the Plaintiff in this lawsuit, I am over  
16 18 years of age and competent to testify in this matter.
- 17 3. In this lawsuit I am asserting that the Defendant, Pond5, sold, offered for  
18 sale and commercially used my copyrighted audio files without my  
permission.
- 19 4. I am an audio professional who has worked as a professional sound  
recordist and in digital media audio production for over 30 years.
- 20 5. I am the world's preeminent recorder of nature sounds. I have spent the  
21 last 35 years traveling the world often to remote locations to obtain the  
highest quality nature sounds. My sounds have been used in television and  
film productions, and software. I have made my living selling and licensing  
my audio recordings for the past 35 years.

Declaration of Gordon Hempton

LAW OFFICE OF  
NICHOLAS E.D. POWER  
540 GUARD ST. SUITE 150  
FRIDAY HARBOR, WA 98250  
360-298-0464

- 1 6. Pond5 has offered to-date an unknown quantity of my recordings for sale  
2 and has used my recordings to commercially market their business. The  
3 reason I do not know the exact number of my recordings that Pond5  
4 maintains on its website and holds out for sale is because it is impossible for  
5 an outside user of Pond5's website to search by actual author or other  
6 recording characteristic that would identify me as the owner. Rather an  
7 outside user must search for an identifying description of the sound. For  
8 example, if a Pond5 user was searching for his sounds of rainfall, he would  
9 search for "rainfall" or "thunder" or "storm." A user cannot search Pond5  
10 using metadata embedded in the file or other identifying characteristics.  
11 Accordingly, to find my property, say of a bird chirp, I would have to listen  
12 to the hundreds or possibly thousands of results that would be displayed  
13 after entering "bird chirp" in the search data field.
- 14 7. In discovery, Pond5 supplied me with a spreadsheet of what Pond5 reports  
15 to be all the files uploaded by pirate ckennedy342 (a/k/a Hassan Khan).
- 16 8. From the spreadsheet that Pond5 supplied showing all the files that are  
17 purported to have been uploaded by Mr. Khan or his aliases, I then  
18 assembled my own spreadsheet identifying which of those files are my  
19 copyrighted works. A true and correct copy of this spreadsheet is attached  
20 to this Declaration as Exhibit A.
- 21 9. My review of the data Pond5 spreadsheet shows that user ckennedy342 had  
a total of 10,236 tracks posted on Pond5's website. Of those 10,236 tracks  
821 are owned by me. At a minimum, Pond5 sold 114 of the tracks owned  
by me for a total of 208 sales.
10. Pond5 has requested proof that the files Pond5 offered for sale are actually  
mine.
11. In accordance with this request, I have performed an analysis on eleven of  
the 114 tracks Pond5 sold.
12. As an audio professional I am able to use various technological tools to  
show that the files are identical. I used two distinct methods; wave form  
display and spectrum analysis.
13. Wave form display is common to all audio editing software programs. I  
used a program that is commercially available and called Sound Forge Pro  
11.0.
14. When a sound file is opened in an audio editing application the entire  
recording can be seen visually from start (left, zero seconds) to finish (right,  
file duration). Most sound recordings are a complex series of events with

Declaration of Gordon Hempton

LAW OFFICE OF  
NICHOLAS E.D. POWER  
540 GUARD ST. SUITE 150  
FRIDAY HARBOR, WA 98250  
360-298-0464

1 complex wave forms or fluctuations of sound pressure levels. An audio  
2 engineer can look at a recording and immediately see where the loudest  
3 sounds are because they reach highest on the amplitude scale. The quietest  
4 moments are when the wave form settles closely to the center line (zero  
5 amplitude). An experienced audio engineer can also quickly zoom in and  
6 examine any sound event to see greater detail, become familiar with a file  
structure, and go to the sounds they seek. Any experienced audio engineer  
knows that while some sound files look similar, no two sound files look  
exactly alike unless they come from the same original recording. Wave  
form is just one thumbprint or audio signature which can be used to identify  
files as sonically identical.

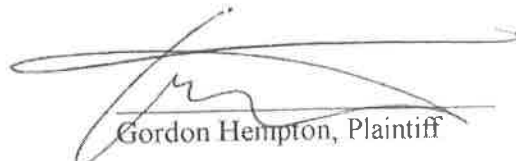
7 15. A second comparison of files can be undertaken by spectrum analysis. I  
8 performed this analysis by using the same commercially available software  
9 Sound Forge Pro 11. Spectrum analysis is when a whole file (or any  
10 portion of a file) is analyzed to produce a summary graph that shows the  
11 frequency range from 20 cycles per second (Hz) to 20,000 Hz. (This is the  
full range of human hearing.) For each frequency the amount of energy or  
amplitude is displayed. The likelihood that any two sound files have exactly  
the same spectrum analysis but sound different is improbable to the extent  
that it is statistically insignificant.

12 16. Both wave form display and spectrum analysis are good file identification  
13 methods because they are fairly independent of sample rates, file formats,  
and metadata--all of which can be easily changed by a user.

14 17. As Exhibit B I have attached a true and correct copy of the graphical and  
15 data output of the wave form display and spectrum analysis of 11 file pairs.  
16 Each pair of files includes one by ckennedy342 and one that I own. We see  
exact matches in wave form display, file lengths (down to one thousandth of  
second) and Blackman-Harris spectrum analysis.

17 18. There is only one conclusion: each of the files in each matched pair are  
18 essentially the same and the Pond5 files are, in fact, mine.

19 Signed on August 3<sup>rd</sup>, 2016 in Joyce, Washington

20  
21   
Gordon Hempton, Plaintiff

Declaration of Gordon Hempton

LAW OFFICE OF  
NICHOLAS E.D. POWER  
540 GUARD ST. SUITE 150  
FRIDAY HARBOR, WA 98250  
360-298-0464

# **EXHIBIT 17**



## Larry Altenbrun

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**From:** Larry Altenbrun  
**Sent:** Thursday, August 11, 2016 6:52 PM  
**To:** Cindy Heidelberg  
**Cc:** nick power; Roger Townsend; Jeanette Hendricks; Curt Feig; Jamie Telegin  
**Subject:** Hempton v. Pond5 - Request for Customer List

Dear Cindy:

We write to address your continuing request that Pond5 produce documentation identifying the customers that downloaded Mr. Hempton's work. In summary, and as explained in detail below, we are willing to provide you with customer information, but only after: (1) you provide us with the audio clips that are purportedly owned by Hempton and uploaded by ckennedy342 in a manner that allows us to reasonably compare those to the files that were uploaded by ckennedy342 onto the AWS servers; (2) we have an opportunity to analyze those clips and reach our own conclusions regarding whether ckennedy342 uploaded material that was owned by the plaintiff; (3) the Court issues a decision denying our motion for summary judgment; and (4) you agree to reasonable limitations on the use of such customer information, including an agreement to limit your use of the information to this lawsuit only.

We have repeatedly stated that it is premature to demand that we identify customers because, despite many requests, the plaintiff has failed to produce substantial evidence demonstrating that he is the owner of those audio clips that were in fact uploaded by ckennedy342 and of which plaintiff *claims* ownership. Despite your recent disclosures, it remains our position that the plaintiff has yet to demonstrate ownership. Further, we are perplexed by your refusal to simply provide us with the audio clips that he purports to own. If the plaintiff owns these clips and they were stolen by ckennedy342 and uploaded to Pond5's website, there is absolutely no reason for you to refuse to simply provide the clips to us so that we can conduct our own comparison between plaintiff's copies of the files and the files that were actually uploaded by ckennedy342.

In February, plaintiff produced over 40 hours of audio recordings that you characterized as "copyrighted source audio belonging to our client." This disclosure includes 69 files and contains over 40 hours of audio. We have repeatedly informed you that the disclosure does not provide Pond5 with any reasonable method of comparing it to the files uploaded by ckennedy342 in order to determine which files uploaded by ckennedy342 were possibly owned by your client.

On July 19, we received a table, which was described by you as containing tracks that (1) were uploaded by ckennedy342, (2) involved sales from Pond5, and (3) were owned by the plaintiff. Counsel stated: "We allege that the following files and data from Ckennedy/Mr. Kahn were infringements of Mr. Hempton's copyrighted works." The table included titles of ckennedy342's clips along with titles of clips that are allegedly owned by the plaintiff. The table included 87 titles. We note that the July 19 disclosure, which came some 16 months after your client first made allegations of copyright infringement, was the very first time that you or your client had ever provided us with a list of files that he contends were uploaded by ckennedy342 and owned by Mr. Hempton. Of course, the actual clips that are allegedly owned by the plaintiff were not produced then and never have been.

We responded to your July 19 disclosure by email on July 21, asking for the "audio files that match those identified in the table." We sent you another email on July 25, again stating that the "plaintiff has never produced evidence for us to independently confirm which files were owned by him."



Last week, you provided a declaration from Mr. Hempton. The declaration states that ckennedy342 uploaded 821 tracks that were owned by Hempton and that, of those 821 tracks, there were sales associated with 114. Mr. Hempton declares that he performed a wave form display and spectrum analysis of 11 of the 114 allegedly sold files and concluded that each of those matched a track that was purportedly owned by him. The declaration includes printouts of the wave form display and spectrum analysis for those 11 tracks. Based upon this limited analysis, Mr. Hempton apparently concludes that all 821 tracks were, in fact, stolen from him.

There are many reasons why we remain unable to conclude that the 821 tracks that were uploaded by ckennedy342 and identified in Mr. Hempton's declaration were owned by him. Below, we identify some of those reasons:

- Pond5 is entitled to conduct its own independent analysis of the audio files that you purport (a) are owned by plaintiff, and (b) were uploaded by ckennedy342. In doing so, we are entitled to examine the very same data that the plaintiff utilized to reach his conclusions. We are not required to conclude that there were some 821 illegal uploads based solely upon a limited analysis conducted by the plaintiff himself, no matter how much expertise he may have in the area. Of course, as we have stated many times, you have prevented us from conducting our own independent analysis because you have refused to disclose or provide Pond5 with the audio clips that plaintiff purportedly owns. We have been requesting these files for months and your failure to produce this evidence is startling. Your failure to even provide us with a reason for not producing the actual audio files is also perplexing.
- Mr. Hempton did not, apparently, conduct any analysis whatsoever of 810 of the 821 tracks that were identified. His declaration states simply that he identified the 821 tracks by reviewing the spreadsheet provided by Pond5. There is no indication that he conducted any analysis of 810 of the 821 tracks that are contained in his spreadsheet. In fact, the declaration doesn't even state that he listened to these tracks. It is our opinion that simply reviewing the 10,000+ names on a spreadsheet and picking out files he believes he owns based on file name or the like, without any further analysis, is inherently flawed and unreliable.
- Plaintiff's allegations of copyright infringement have constantly changed during the past 16 months. If we limit this issue to only clips involving sales, just in the past few weeks, you sent one table that identified 87 clips and a second that identified 114 clips. At various times, you have made allegations of "thousands" of copyrighted clips being offered for sale, to 138 such clips, to, most recently, 821 clips.
- Because you have failed to produce the clips that were owned by plaintiff, you have prevented us from conducting our own analysis of the clips. However, even the limited evidence available to us presents some objective data that raises serious questions about the reliability of the plaintiff's conclusions. For example, the third file listed in both the July 21 table and the spreadsheet attached to plaintiff's declaration, which is titled "Owl Hoot," was previously identified by the plaintiff as matching the plaintiff's file "QP01 0060 Deciduous forest owl hoot.wav." "Owl Hoot" is 4.6 seconds in length. According to Mr. Hempton's website (<https://quietplanet.com/products/essentials.pdf>), the corresponding file he contends is identical to "Owl Hoot" is only 3 seconds in length. Perhaps there is a valid explanation for this and other apparent discrepancies, but this highlights the need for plaintiff to provide us with the audio tracks so that we can conduct our own analysis.
- Of the 27 tracks that were, without explanation, somehow added between July 19 and last week, none of those were included in the 11 samples that the plaintiff purportedly analyzed and provided to us. Plaintiff has not provided us with any rationale for his selection of the 11 files he analyzed and his selection of those files raises questions regarding the reliability and predictive capability of his approach. The newly added tracks, with very few exceptions, involve a different naming sequence than the previous ones. In particular, the newly added tracks almost always capitalize the first letter of every

word (e.g. Thunder Booming) whereas the previous tracks almost always capitalize only the first letter of the first word (e.g., Thunder distant). Again, this raises questions of reliability.

- The new spreadsheet does not contain names of the Hempton file that corresponds to the allegedly stolen file, whereas the previous table did. Thus, with respect to the 27 newly added clips, plaintiff has not provided us with the corresponding name of the Hempton clip.

For the foregoing reasons, we do not believe that the plaintiff has produced sufficient evidence for Pond5 to identify which tracks are “Gordon Hempton’s sound files.” As a result, plaintiff has simply failed to provide sufficient evidence for Pond5 to identify any customer that purchased licenses of sound files that were owned by the plaintiff. Obviously, as we have stated for months, plaintiff can probably avoid further disputes over these issues by simply producing the audio clips that he contends he owns and that correspond to the clips that were uploaded by ckennedy342. You have never provided us with any reason for your refusal to provide us with such clips and, without them, we are unable to reach any conclusions regarding your allegations of copyright infringement.

As you know, Pond5 has moved for summary judgment based upon a safe harbor under the Digital Millennium Copyright Act. The DMCA was enacted to protect companies like Pond5, which has very limited control over an individual user’s decision to upload infringing material. Pond5 is entitled to protection under the DMCA and we believe that we will prevail on our motion for summary judgment. Even if we don’t prevail on summary judgment, we are confident that the DMCA defense will succeed at trial. In any event, we are unaware of any provision under the DMCA that requires Pond5 to disclose its customer list. The DMCA requires Pond5 to remove allegedly offending material, which it did (despite the fact that a proper takedown letter was never sent), but the DMCA does not require Pond5 to contact customers or provide an alleged copyright owner with a list of customers. As such, we are unwilling to provide any customer list until after the court issues a decision on our summary judgment motion.

While we recognize that plaintiff is entitled to wide latitude in seeking discovery, we strongly believe that the potential probative value associated with contacting customers is minimal and is outweighed by the damage that such contact could cause to Pond5. This is especially true under the present circumstances, where Pond5 is awaiting a decision on its DMCA defense, plaintiff’s claims are nothing more than allegations, and the plaintiff has, despite many requests, refused to simply disclose the audio files that he purportedly owns in a manner that allows Pond5 to reasonably analyze those files.

In light of the foregoing, we will conditionally agree to produce customer lists. The conditions are as follows:

- (1) Plaintiff produces the audio files that he contends he owns and that correspond to the 821 files that were uploaded by ckennedy342. These files must be produced in a manner that reasonably allows Pond5 to identify which file corresponds to which upload by ckennedy342, such that Pond5 can reasonably conduct its own analysis.
- (2) Pond5 conducts an independent analysis and reaches its own conclusions that ckennedy342 uploaded material that was owned by the plaintiff;
- (3) The Court issues a decision denying, in whole or in part, Pond5’s motion for summary judgment. We understand that you might have some concerns about agreeing to effectively delay this discovery until after the Court issues a decision. To the extent that discovery deadlines must be extended for purposes of conducting discovery associated with the customer list, we will agree to such extensions;
- (4) Plaintiff agrees, in writing, to limit his use of the customer list to purposes related solely to this lawsuit.

We also caution you that, in the event that the plaintiff contacts Pond5's customers, he needs to be very careful about what is communicated to those customers. If the plaintiff makes defamatory statements, tortiously interferes with Pond5's contractual relations, or otherwise breaches any duties owed to Pond5, he will be subject to damages and Pond5 will pursue him vigorously.

Please note that our conditional offer to disclose the customer lists is made for purposes of resolving this discovery dispute without the Court's involvement. If you decide to involve the Court in this issue, we reserve the right to seek alternative relief, including, without limitation, a ruling that we are not required to disclose the identity of customers in any circumstances.

We look forward to hearing from you.

Best Regards,

Larry

Larry E. Altenbrun  
Nicoll Black & Feig PLLC  
1325 Fourth Ave., Suite 1650  
Seattle, WA 98101  
P: 206-838-7541  
C: 206-920-5369  
F: 206-838-7515

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**From:** Cindy Heidelberg [mailto:cheidelberg@bjtlegal.com]  
**Sent:** Friday, August 05, 2016 9:29 AM  
**To:** Larry Altenbrun  
**Cc:** nick power; Roger Townsend; Jeanette Hendricks; Curt Feig; Jamie Telegin  
**Subject:** RE: Hempton v. Pond5 Meet and Confer

Larry,

I write to follow-up on two matters we discussed below:

**1) Sound Files**

As stated below, we continue to disagree with your assertion that there can be any reasonable dispute – especially following our production of Mr. Hempton's sound files – that the sound files uploaded by ckennedy and posted for sale by Pond5 are Mr. Hempton's copyrighted works. However, you have asked for additional proof and we stated that we will produce such proof.

Attached is a declaration by Mr. Hempton containing two exhibits: 1) a spreadsheet identifying tracks uploaded by ckennedy that are Mr. Hempton's; and 2) a wavelength and spectrum analysis on a sample of these tracks showing that the "thumbprint" of the tracks Pond5 held out for sale are sonically identical and are all, indeed, Mr. Hempton's copyrighted works. This should remove any remaining "reasonable dispute" that the ckennedy sound files offered for sale on Pond5 are not, in fact, Mr. Hempton's sound files.

**2) Identity of End Users**

# **EXHIBIT 18**

**Larry Altenbrun**

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**From:** Roger Townsend <rtownsend@bjtlegal.com>  
**Sent:** Monday, August 29, 2016 10:54 AM  
**To:** Larry Altenbrun  
**Cc:** Curt Feig; Cindy Heidelberg; nick power; Jamie Telegin; Roger Townsend; Jeanette Hendricks  
**Subject:** Meet and Confer Follow UP  
**Attachments:** Evaluation License End Users.pdf; 83 Hempton files sold by Pond5.pdf  
**Importance:** High

Larry:

I am following up on our prior meet and confer on the issue of production of end user information. You client admitted that Pond5 collects end user names, addresses, email, and phone numbers, but has undertaken no effort to investigate regarding the use of Mr. Hempton's works. Now that there should be no legitimate question of fact regarding the fact that Mr. Hempton's sound files were uploaded by ckennedy/Hassan Kahn and sold on the Pond5 system to Pond5 customers, we reiterate our request for that information (and any other information regarding the end users and their purchases).

Furthermore, we intend to seek leave to amend the complaint under FRCP 15(a) to name Does. Mr. Hempton has a claim for injunctive relief and damages against those end users who obtained evaluation licenses or paid licenses through Pond5.

We respectfully request that Pond5 agree to stipulate to grant Plaintiff leave to amend the complaint to name the individual end users and for Pond5 to produce its data relevant to each of the end users in the attached list (file entitled "83 Hempton files sold by Pond5") and any evaluation licenses granted to Mr. Hempton's files in the attached list (file entitled "Evaluation License End Users").

Pursuant to the Court's order (Dkt #29), we request to arrange a telephone hearing to contact chambers at (202) 354-3330 on a single line. We are available for that call **today or tomorrow or Wednesday morning**. Please advise as to your availability.

I am, of course, available to further confer regarding the request to stipulate or otherwise discuss the substance of the motions.

Yours truly,  
Roger

Roger M. Townsend  
BRESKIN JOHNSON & TOWNSEND PLLC  
1000 Second Avenue, Suite 3670  
Seattle, WA 98104  
Office: (206) 652-8660  
Direct: (206) 518-6200  
Fax: (206) 652-8290

IMPORTANT: This e-mail message and any attachments are confidential and may be privileged. If you are not the intended recipient please notify the sender immediately -- by replying to this message -- and destroy all copies of this message and any attachments. Thank you.

# **EXHIBIT 19**

THE HONORABLE BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

Gordon Hempton,

Plaintiff,

v.

Pond5 , Inc., a Delaware Corporation; and  
Pond5 user ckennedy342, a corporation or  
individual of type unknown,

Defendants.

NO. 3:15-cv-05696-RBL

PLAINTIFF'S RESPONSE TO  
DEFENDANTS' FIRST SET OF  
INTERROGATORIES AND REQUESTS  
FOR PRODUCTION

Plaintiff Gordon Hempton responds to Defendants' First Set of Interrogatories and Requests for Production as follows: Plaintiff hereby incorporates the following General Objections into each and every individual response contained herein and into any future amendment, supplement or modification to these responses, as well as any future discovery request of the plaintiff.

1. Plaintiff's responses and objections are based upon information and belief after a reasonably diligent search of all available records relating to the matters referred to in the Complaint and the Answer in this lawsuit. Plaintiff has yet to complete its investigation and discovery of the facts pertaining to this action or its preparation for trial, and therefore reserves its rights to amend, modify, or supplement the objections or responses, if necessary, at a later

PLAINTIFF'S RESPONSE TO DEFENDANTS'  
FIRST SET OF INTERROGATORIES AND  
REQUESTS FOR PRODUCTION - 1

BRESKIN | JOHNSON | TOWNSEND PLLC  
1000 Second Avenue, Suite 3670  
Seattle, Washington 98104 Tel: 206-652-8660



1 date. Plaintiff's responses are dependent upon full and complete responses to discovery from  
2 Defendant Pond5 which have not been provided at this time.

3 2. In providing the following responses, Plaintiff does not waive, but rather  
4 intends to preserve the following:

- 5 a. all objections as to competency, relevancy, materiality and admissibility;
- 6 b. the right to object on any ground to the use or admissibility of the responses  
7 herein or documents produced by Plaintiff in any subsequent proceedings including the trial of  
8 this or any other action;
- 9 c. all objections as to vagueness and ambiguity; and
- 10 d. the right to object on any ground to any further discovery requests propounded  
11 to plaintiff.

12 3. Plaintiff objects to each Interrogatory or Request for Production to the extent it  
13 seeks information or documents protected against disclosure by the attorney-client privilege,  
14 work product doctrine, joint defense privilege, and any other judicially recognized protection  
15 or privilege.

16 4. Plaintiff objects to Defendant's discovery requests to the extent that they seek to  
17 impose obligations on Plaintiff to produce a privilege log in excess of the obligation imposed  
18 by Rule 26(b)(5). Plaintiff will produce a privilege log that lists all pre-litigation documents  
19 which Plaintiff is withholding pursuant to a privilege claim. Plaintiff will not, however, include  
20 in its privilege log any post-litigation work product and attorney-client communications  
21 generated after the commencement of litigation because, if it did so, Plaintiff would need to log  
22 its entire litigation file, which would be unduly burdensome and not reasonably calculated to  
23 lead to the discovery of admissible evidence.

24 5. Plaintiff objects to each Interrogatory or Request for Production to the extent it  
25 seeks information or documents regarding "each," "all," "every," or "any" on the grounds that it  
26 is overly broad and unduly burdensome. Plaintiff has used reasonable diligence to provide



1 documents based on an examination of those files that may reasonably be expected to contain  
2 responsive documents.

3 6. Plaintiff objects to each Interrogatory or Request for Production to the extent  
4 that it seeks information or documents to which plaintiff has equal or greater access.

5 7. Plaintiff objects to the definition of "document" as overly broad, unduly  
6 burdensome, and beyond the scope of the Rules of Civil Procedure to the extent it purports to  
7 apply to information that is protected by the attorney client privilege or other applicable  
8 privilege.

9 8. Plaintiff objects to all of Defendant's instructions to the extent that they are  
10 vague, ambiguous, overly broad, unduly burdensome, and inconsistent with the applicable  
11 Rules of Civil Procedure. The manner and method of Plaintiff's objections and responses  
12 herein, including without limitation the scope of the documents that may be subject to  
13 production and the persons or other entities from whom production may be required, and  
14 Plaintiff's rights and obligations concerning any duty to supplement, any documents withheld  
15 under claim of privilege, and the time period relevant to any duty to produce, are governed  
16 solely by the applicable Federal Rules of Civil Procedure and not the instructions set forth in  
17 plaintiff's discovery requests.

### 18 INTERROGATORIES

19 INTERROGATORY NO. 1: Describe with specificity each and every fact that  
20 supports your allegation that ckennedy342 uploaded work that was owned by plaintiff to  
21 Pond5's website.

### 22 ANSWER:

23 Objection, this request seeks information that is protected by the attorney-client  
24 privilege and/or would require Plaintiff to disclose his attorneys' mental impressions,  
25 conclusions, opinions, reasons, legal theories, other work product or the like which is protected  
26 by the work product doctrine. Plaintiff objects, discovery is ongoing and, as such, this

1 the grounds that this discovery request is vague and ambiguous, seeks information not likely to  
2 lead to the discovery of admissible evidence, is overbroad, unduly burdensome, seeks  
3 information that is more easily accessible to Pond5, and is premature as discovery is ongoing in  
4 this lawsuit. Without waiving the foregoing objections, Plaintiff responds as follows:

5 See documents produced in responses to RFPs in this case and see response to  
6 Interrogatory No. 1, 2, 5, 7, 8, 9 and 10.

7  
8 **INTERROGATORY NO. 18:** Describe with specificity each and every fact that  
9 supports or explains your claim for statutory damages including, without limitation, the  
10 number of “works” that you claim were infringed, the identity of such works, the amount of  
11 statutory damages sought for each violation, and the factual basis for each such award.

12 **ANSWER:**

13 Objection, this request seeks information that is protected by the attorney-client  
14 privilege and/or would require Plaintiff to disclose his attorney’s mental impressions,  
15 conclusions, opinions, reasons, legal theories, other work product or the like which is protected  
16 by the work product doctrine. Objection, this request calls for legal conclusions. Objection,  
17 this discovery request seeks premature disclosure of expert witnesses and/or expert report  
18 inconsistent with the Court’s order and the Fed. R. of Civ. P. Plaintiff further objects because  
19 this discovery request seeks impermissible disclosure of consulting expert. Plaintiff further  
20 objects on the basis that it calls for a “dress rehearsal” for the trial and calls for evidence upon  
21 which it intends to rely to prove any fact or facts. Plaintiff further objects on the grounds that  
22 this discovery request is vague and ambiguous, seeks information not likely to lead to the  
23 discovery of admissible evidence, is overbroad, unduly burdensome, seeks information that is  
24 more easily accessible to Pond5, and is premature as discovery is ongoing in this lawsuit.  
25 Without waiving the foregoing objections, Plaintiff responds as follows:

26 Without waiving the foregoing objections, Plaintiff responds as follows:

Each copyrighted file is independently economically viable. Each time a work was sold without authorization by the copyright holder constitutes an infringement. Each file of Mr. Hempton's that was held out for sale by Pond5 is a separate infringement. From Pond5's production, Mr. Hempton has concluded that Pond5 held out for sale 655 files uploaded by ckennedy342 which are Mr. Hempton's copyrighted works. It appears from Pond5's production that there were 176 separate sales of 86 sound files, all of which are infringed versions of Mr. Hempton's work. Moreover, each time an evaluation copy is downloaded constitutes an infringement, whether or not remuneration was received by Pond5. Despite Plaintiff's discovery requests, Pond5 has not yet supplied Mr. Hempton with discovery showing the number of times evaluation copies were downloaded of Mr. Hempton's works. Analysis of the full scope of infringement through the Pond5 system is dependent upon Pond5's compliance with its discovery obligations, which it has not fulfilled at this time.

See also documents produced in responses to RFPs in this case and see response to Interrogatory No. 1, 2, 5, 7, 8, 9 and 10.

### **REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION NO. 1:** All documents that support your contention that Pond5 infringed upon your copyrights.

### **RESPONSE:**

Objection: *see* objection to Interrogatory No. 1; discovery and case development is ongoing and Plaintiff reserves the right to identify additional documents and supplement its discovery; seeks information already produced to the requesting party, or already within the requesting party's possession and/or control.

Without waiving these objections, *see* attached documents. *See also* PON 000284-291; PON 000294; PON 000539.

1 DATED this 2nd day of September, 2016.

2  
3 BRESKIN JOHNSON & TOWNSEND PLLC

4 By: /s/ Roger M. Townsend

5 Roger M. Townsend

6 1000 Second Avenue, Suite 3670

7 Seattle, WA 98104

8 Phone: 206-652-8660

9 Facsimile: 206-652-8290

10 rtownsend@bjtlegal.com

11 *Attorneys for Plaintiff*

**CERTIFICATION OF ATTORNEY**

The undersigned attorney for plaintiff has read the foregoing answers and responses to interrogatories and requests for production, and they are in compliance with FRCP 26.

Responses and objections dated this 2<sup>nd</sup> day of September, 2016.

s/ Roger M. Townsend  
Attorneys for Plaintiff

## VERIFICATION

STATE OF \_\_\_\_\_ )  
 ) ss  
COUNTY OF \_\_\_\_\_ )

Gordon Hempton, being first duly sworn on oath, deposes and states:

I am the plaintiff in the above-captioned matter. I have read the within and foregoing discovery requests and the answers and responses thereto, know the contents thereof and believe the same to be true.

Gordon Hempton

Subscribed and sworn to before me on \_\_\_\_\_

Print Name: \_\_\_\_\_

NOTARY PUBLIC for the state of

\_\_\_\_\_, residing at \_\_\_\_\_

My appointment expires: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

Under penalty of perjury under the laws of the State of Washington, I hereby certify that on this 2<sup>nd</sup> day of September, 2016, I caused a copy of the foregoing document to be served on the following attorneys of record in the manner indicated:

Curt H. Feig  
Larry E. Altenbrun  
Nicoll Black & Feig PLLC  
1325 Fourth Avenue, Suite 1650  
Seattle, WA 98101  
Tel: 206-838-7555  
cfeig@nicollblack.com  
laltenbrun@nicollblack.com

☒ Via Email Only per e-Service Agreement

/s/ Jamie Telegin  
Jamie Telegin, Legal Assistant

# **EXHIBIT 20**



THE HONORABLE BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

Gordon Hempton,

Plaintiff,

v.

Pond5 , Inc., a Delaware Corporation; and  
Pond5 user ckennedy342, a corporation or  
individual of type unknown,

Defendants.

NO. 3:15-cv-05696-RBL

**PLAINTIFF'S CORRECTED**  
RESPONSE TO DEFENDANTS' FIRST  
SET OF INTERROGATORIES AND  
REQUESTS FOR PRODUCTION

Plaintiff Gordon Hempton responds to Defendants' First Set of Interrogatories and Requests for Production as follows: Plaintiff hereby incorporates the following General Objections into each and every individual response contained herein and into any future amendment, supplement or modification to these responses, as well as any future discovery request of the plaintiff.

1. Plaintiff's responses and objections are based upon information and belief after a reasonably diligent search of all available records relating to the matters referred to in the Complaint and the Answer in this lawsuit. Plaintiff has yet to complete its investigation and discovery of the facts pertaining to this action or its preparation for trial, and therefore reserves its rights to amend, modify, or supplement the objections or responses, if necessary, at a later

PLAINTIFF'S **CORRECTED** RESPONSE TO  
DEFENDANTS' FIRST SET OF INTERROGATORIES  
AND REQUESTS FOR PRODUCTION - 1

**BRESKIN | JOHNSON | TOWNSEND PLLC**  
1000 Second Avenue, Suite 3670  
Seattle, Washington 98104 Tel: 206-652-8660

1 date. Plaintiff's responses are dependent upon full and complete responses to discovery from  
2 Defendant Pond5 which have not been provided at this time.

3 2. In providing the following responses, Plaintiff does not waive, but rather  
4 intends to preserve the following:

5 a. all objections as to competency, relevancy, materiality and admissibility;

6 b. the right to object on any ground to the use or admissibility of the responses  
7 herein or documents produced by Plaintiff in any subsequent proceedings including the trial of  
8 this or any other action;

9 c. all objections as to vagueness and ambiguity; and

10 d. the right to object on any ground to any further discovery requests propounded  
11 to plaintiff.

12 3. Plaintiff objects to each Interrogatory or Request for Production to the extent it  
13 seeks information or documents protected against disclosure by the attorney-client privilege,  
14 work product doctrine, joint defense privilege, and any other judicially recognized protection  
15 or privilege.

16 4. Plaintiff objects to Defendant's discovery requests to the extent that they seek to  
17 impose obligations on Plaintiff to produce a privilege log in excess of the obligation imposed  
18 by Rule 26(b)(5). Plaintiff will produce a privilege log that lists all pre-litigation documents  
19 which Plaintiff is withholding pursuant to a privilege claim. Plaintiff will not, however, include  
20 in its privilege log any post-litigation work product and attorney-client communications  
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1 documents based on an examination of those files that may reasonably be expected to contain  
2 responsive documents.

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5 7. Plaintiff objects to the definition of "document" as overly broad, unduly  
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7 apply to information that is protected by the attorney client privilege or other applicable  
8 privilege.

9 8. Plaintiff objects to all of Defendant's instructions to the extent that they are  
10 vague, ambiguous, overly broad, unduly burdensome, and inconsistent with the applicable  
11 Rules of Civil Procedure. The manner and method of Plaintiff's objections and responses  
12 herein, including without limitation the scope of the documents that may be subject to  
13 production and the persons or other entities from whom production may be required, and  
14 Plaintiff's rights and obligations concerning any duty to supplement, any documents withheld  
15 under claim of privilege, and the time period relevant to any duty to produce, are governed  
16 solely by the applicable Federal Rules of Civil Procedure and not the instructions set forth in  
17 plaintiff's discovery requests.

### 18 INTERROGATORIES

19 INTERROGATORY NO. 1: Describe with specificity each and every fact that  
20 supports your allegation that ckenedy342 uploaded work that was owned by plaintiff to  
21 Pond5's website.

### 22 ANSWER:

23 Objection, this request seeks information that is protected by the attorney-client  
24 privilege and/or would require Plaintiff to disclose his attorneys' mental impressions,  
25 conclusions, opinions, reasons, legal theories, other work product or the like which is protected  
26 by the work product doctrine. Plaintiff objects, discovery is ongoing and, as such, this

1 the grounds that this discovery request is vague and ambiguous, seeks information not likely to  
2 lead to the discovery of admissible evidence, is overbroad, unduly burdensome, seeks  
3 information that is more easily accessible to Pond5, and is premature as discovery is ongoing in  
4 this lawsuit. Without waiving the foregoing objections, Plaintiff responds as follows:

5 See documents produced in responses to RFPs in this case and see response to  
6 Interrogatory No. 1, 2, 5, 7, 8, 9 and 10.

7  
8 **INTERROGATORY NO. 18:** Describe with specificity each and every fact that  
9 supports or explains your claim for statutory damages including, without limitation, the  
10 number of “works” that you claim were infringed, the identity of such works, the amount of  
11 statutory damages sought for each violation, and the factual basis for each such award.

12 **ANSWER:**

13 Objection, this request seeks information that is protected by the attorney-client  
14 privilege and/or would require Plaintiff to disclose his attorney’s mental impressions,  
15 conclusions, opinions, reasons, legal theories, other work product or the like which is protected  
16 by the work product doctrine. Objection, this request calls for legal conclusions. Objection,  
17 this discovery request seeks premature disclosure of expert witnesses and/or expert report  
18 inconsistent with the Court’s order and the Fed. R. of Civ. P. Plaintiff further objects because  
19 this discovery request seeks impermissible disclosure of consulting expert. Plaintiff further  
20 objects on the basis that it calls for a “dress rehearsal” for the trial and calls for evidence upon  
21 which it intends to rely to prove any fact or facts. Plaintiff further objects on the grounds that  
22 this discovery request is vague and ambiguous, seeks information not likely to lead to the  
23 discovery of admissible evidence, is overbroad, unduly burdensome, seeks information that is  
24 more easily accessible to Pond5, and is premature as discovery is ongoing in this lawsuit.  
25 Without waiving the foregoing objections, Plaintiff responds as follows:

26 Without waiving the foregoing objections, Plaintiff responds as follows:

Each copyrighted file is independently economically viable. Each time a work was sold without authorization by the copyright holder constitutes an infringement. Each file of Mr. Hempton's that was held out for sale by Pond5 is a separate infringement. From Pond5's production, Mr. Hempton has concluded that Pond5 held out for sale 655 files uploaded by ckennedy342 which are Mr. Hempton's copyrighted works. It appears from Pond5's production that there were 146 separate sales of 86 sound files, all of which are infringed versions of Mr. Hempton's work. Moreover, each time an evaluation copy is downloaded constitutes an infringement, whether or not remuneration was received by Pond5. Despite Plaintiff's discovery requests, Pond5 has not yet supplied Mr. Hempton with discovery showing the number of times evaluation copies were downloaded of Mr. Hempton's works. Analysis of the full scope of infringement through the Pond5 system is dependent upon Pond5's compliance with its discovery obligations, which it has not fulfilled at this time.

See also documents produced in responses to RFPs in this case and see response to Interrogatory No. 1, 2, 5, 7, 8, 9 and 10.

#### **REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION NO. 1:** All documents that support your contention that Pond5 infringed upon your copyrights.

#### **RESPONSE:**

Objection: *see* objection to Interrogatory No. 1; discovery and case development is ongoing and Plaintiff reserves the right to identify additional documents and supplement its discovery; seeks information already produced to the requesting party, or already within the requesting party's possession and/or control.

Without waiving these objections, *see* attached documents. *See also* PON 000284-291; PON 000294; PON 000539.

1 DATED this 2nd day of September, 2016.

2  
3 BRESKIN JOHNSON & TOWNSEND PLLC

4 By: /s/ Roger M. Townsend

5 Roger M. Townsend

6 1000 Second Avenue, Suite 3670

7 Seattle, WA 98104

8 Phone: 206-652-8660

9 Facsimile: 206-652-8290

10 rtownsend@bjtlegal.com

11 *Attorneys for Plaintiff*

**CERTIFICATION OF ATTORNEY**

The undersigned attorney for plaintiff has read the foregoing answers and responses to interrogatories and requests for production, and they are in compliance with FRCP 26.

Responses and objections dated this 2<sup>nd</sup> day of September, 2016.

s/ Roger M. Townsend


Attorneys for Plaintiff

VERIFICATION

STATE OF Washington ss  
COUNTY OF Clallam

Gordon Hempton, being first duly sworn on oath, deposes and states:

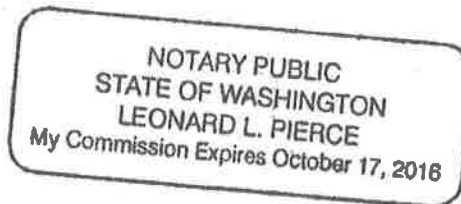
I am the plaintiff in the above-captioned matter. I have read the within and foregoing discovery requests and the answers and responses thereto, know the contents thereof and believe the same to be true.

  
Gordon Hempton

Subscribed and sworn to before me on Sept 6<sup>th</sup> 2016

  
Print Name: LEONARD L. PIERCE

NOTARY PUBLIC for the state of WA, residing at Sayce  
My appointment expires: 10/17/2016





**CERTIFICATE OF SERVICE**

Under penalty of perjury under the laws of the State of Washington, I hereby certify that on this 2<sup>nd</sup> day of September, 2016, I caused a copy of the foregoing document to be served on the following attorneys of record in the manner indicated:

Curt H. Feig  
Larry E. Altenbrun  
Nicoll Black & Feig PLLC  
1325 Fourth Avenue, Suite 1650  
Seattle, WA 98101  
Tel: 206-838-7555  
cfeig@nicollblack.com  
laltenbrun@nicollblack.com

☒ Via Email Only per e-Service Agreement

/s/ Jamie Telegin  
Jamie Telegin, Legal Assistant

# **EXHIBIT 21**

# **Rough Draft of Rough Draft of Gordon W. Hempton**

**September 8, 2016**



**SEATTLE 206.287.9066**

**OLYMPIA 360.534.9066    SPOKANE 509.624.3261    NATIONAL 800.846.6989**

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E-mail: [info@buellrealtime.com](mailto:info@buellrealtime.com)

[<www.buellrealtime.com>](http://www.buellrealtime.com)

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<p>1 MR. TOWNSEND: Objection to the extent it</p> <p>2 calls for a legal conclusion. Lack of foundation. Go</p> <p>3 ahead.</p> <p>4 THE WITNESS: Repeat the question.</p> <p>5 <b>Q (By Mr. Altenbrun) You testified previously that</b></p> <p>6 <b>at least some of these works were derived from previous work</b></p> <p>7 <b>that you did. Is that right?</b></p> <p>8 A Yes. Yes.</p> <p>9 <b>Q Do you know, Is there a previous work you have</b></p> <p>10 <b>published in this which this particular file QP 010007</b></p> <p>11 <b>thunder close exists?</b></p> <p>12 A It's possible if we check the records we'd be able</p> <p>13 to determine that. But for me to read this name and not</p> <p>14 hear it and not check the database to trace it down to see</p> <p>15 if it belongs to a previous registration, I can't answer</p> <p>16 that question.</p> <p>17 <b>Q Okay. So with respect to these 655 files?</b></p> <p>18 A Yes. Okay.</p> <p>19 <b>Q Some of them belong to a previous registration; is</b></p> <p>20 <b>that correct?</b></p> <p>21 A Yes.</p> <p>22 <b>Q And some of them do not?</b></p> <p>23 A They belong -- some of them do not. They belong</p> <p>24 to a Quiet Planet registration, yes.</p> <p>25 <b>Q So some of these belong to a Quiet Planet</b></p>	<p>1 A Yes, for example, the Sound Tracker music label.</p> <p>2 <b>Q Okay.</b></p> <p>3 A My -- yeah. So.</p> <p>4 <b>Q When you say the Sound Tracker music label that's</b></p> <p>5 <b>a previous registration you're referring to?</b></p> <p>6 A No. It's the previous business. Earlier I</p> <p>7 mentioned how sound tracker converted to Quiet Planet. When</p> <p>8 I converted from sole proprietorship to LLC.</p> <p>9 <b>Q Okay. What steps would you take to determine all</b></p> <p>10 <b>of the registrations that a particular file, for example, QP</b></p> <p>11 <b>0007 is part of?</b></p> <p>12 A All right. MR. TOWNSEND: well, object to the</p> <p>13 extent is it calls for a legal conclusion. You can answer.</p> <p>14 THE WITNESS: It was a monumental task.</p> <p>15 Basically, I had to create a highly specific database that</p> <p>16 would integrate with my Quiet Planet database and then use</p> <p>17 the file matching after hearing all this. Basically I</p> <p>18 listened to all these files. I did spectrum analysis, wave</p> <p>19 form analysis. These are the same files. But I have to tie</p> <p>20 it to original registration, right, beyond the six</p> <p>21 registrations. Is that your question?</p> <p>22 <b>Q (By Mr. Altenbrun) No.</b></p> <p>23 A Okay.</p> <p>24 <b>Q Can you read my question, please.</b></p> <p>25 <b>(Requested material read.)</b></p>
Page 22	Page 24
<p>1 <b>registration and some belong to a Quiet Planet registration</b></p> <p>2 <b>and the registration of a previous work; is that correct?</b></p> <p>3 A I believe so, yes.</p> <p>4 <b>Q What do you mean by a Quiet Planet registration?</b></p> <p>5 A That after the production of essentials QP 01 for</p> <p>6 example, the collection itself is sent off to the copyright</p> <p>7 office and registered. So in the sense of Quiet Planet there</p> <p>8 were not 655 registration in order to cover these files.</p> <p>9 There were a number of collections that were registered.</p> <p>10 <b>Q Well, these files were registered in six different</b></p> <p>11 <b>registrations, correct?</b></p> <p>12 A Let me see</p> <p>13 MR. TOWNSEND: Objection lack of foundation,</p> <p>14 misstates prior testimony. You can answer.</p> <p>15 THE WITNESS: It appears that it is true,</p> <p>16 yes.</p> <p>17 <b>Q (By Mr. Altenbrun) You agree that all 655 of</b></p> <p>18 <b>these files come from six different collections, correct?</b></p> <p>19 A If I understand your question correctly, that the</p> <p>20 655 files that show the Quiet Planet occur also in six</p> <p>21 different registrations, yes. And the content occurs most</p> <p>22 likely in more.</p> <p>23 <b>Q And that's because some of these files are part of</b></p> <p>24 <b>what you refer to as at Quiet Planet registration but also</b></p> <p>25 <b>part of a previous registration; is that correct?</b></p>	<p>1 THE WITNESS: Okay. Yes. And so I'm in the</p> <p>2 process of answering that question. So integration of the</p> <p>3 database we show the source file content, we show the date</p> <p>4 of recording. We show when it was happening I. Know when</p> <p>5 the project involved, that it was published in, the whole</p> <p>6 thing and so that's how it comes about. Right. And this is</p> <p>7 a relational database.</p> <p>8 MR. TOWNSEND: I don't want to disturb your</p> <p>9 flow but can I take a break?</p> <p>10 MR. ALTENBRUN: Sure. We can take a break.</p> <p>11 (Recess.)</p> <p>12 <b>Q (By Mr. Altenbrun) Back on the record. Quiet</b></p> <p>13 <b>Planet maintains a website, correct?</b></p> <p>14 A Yes.</p> <p>15 <b>Q And the URL for that website is Quiet Planet.com;</b></p> <p>16 <b>is that correct?</b></p> <p>17 A Correct.</p> <p>18 <b>Q And on that website, if I click on products, I can</b></p> <p>19 <b>see the various collections that are available for</b></p> <p>20 <b>licensing, correct?</b></p> <p>21 A Yes.</p> <p>22 <b>Q And from that page I can also click on the</b></p> <p>23 <b>individual collections, right?</b></p> <p>24 A Yes</p> <p>25 (Exhibit Number 23 marked.)</p>

Page 25	Page 27
<p>1 MR. TOWNSEND: This doesn't have a Bates?</p> <p>2 MR. ALTENBRUN: No. I just down loaded this</p> <p>3 yesterday from the website.</p> <p>4 Q (By Mr. Altenbrun) This document that's been</p> <p>5 marked as Exhibit 23, this -- does this contain examples of</p> <p>6 the page from Quiet Planet.com that has some details about</p> <p>7 individual collections?</p> <p>8 A You kind of got muffled there. So if you would</p> <p>9 ask the question face me, that would help.</p> <p>10 Q Exhibit 23 is a six page document, correct?</p> <p>11 A Okay. It appears so.</p> <p>12 Q Okay. And does this appear to contain pages from</p> <p>13 be website Quiet Planet.com that refer to some of these</p> <p>14 individual collections on that website?</p> <p>15 A Yes. That's are called the product pages.</p> <p>16 Q Okay. And then do you see on each of those pages,</p> <p>17 there is something that says contents, click here to down</p> <p>18 load PDF?</p> <p>19 A Yes.</p> <p>20 Q And what happens if one were to click on that?</p> <p>21 A Well, if you down load the PDF, then you will see</p> <p>22 a catalog of titles of all the contained sound tracks. In</p> <p>23 other words, on the first page here, essentials collection</p> <p>24 which I happen to know is the QP 01 and then it continues,</p> <p>25 that we'll see the PDF will reveal a multipage document</p>	<p>1 A Yes.</p> <p>2 Q Is it true that QP 06 is titled prairies?</p> <p>3 A Yes.</p> <p>4 Q With respect to the files that are located on the</p> <p>5 six collections identified in Exhibit 23, do you own the</p> <p>6 copyright to those files?</p> <p>7 MR. TOWNSEND: Objection, calls for a legal</p> <p>8 conclusion. Ambiguous.</p> <p>9 THE WITNESS: Yes, they're registered in my</p> <p>10 name, Gordon Hempton.</p> <p>11 THE WITNESS: When you object, can we have</p> <p>12 this conversation now? When you object, am I free to choose</p> <p>13 whether to answer?</p> <p>14 MR. ALTENBRUN: Answer unless I instruct you</p> <p>15 not to answer to the best of your ability.</p> <p>16 THE WITNESS: Okay.</p> <p>17 MR. TOWNSEND: Don't guess. Don't make</p> <p>18 anything up.</p> <p>19 THE WITNESS: All right. Thank you for the</p> <p>20 explanation.</p> <p>21 MR. ALTENBRUN: It's a reasonable question to</p> <p>22 ask.</p> <p>23 Let's mark this please.</p> <p>24 (Exhibit Number 25 marked.)</p> <p>25 Q (By Mr. Altenbrun) You've been handed an exhibit</p>
Page 26	Page 28
<p>1 which lists all of the files by length and whatever. Right.</p> <p>2 Q Okay. Let's mark this.</p> <p>3 (Exhibit No. 24 marked.)</p> <p>4 Q (By Mr. Altenbrun) The document that's been</p> <p>5 handed to you that is been marked as Exhibit 24, is this an</p> <p>6 example of the PDF that you were referring to in answer to</p> <p>7 the previous question.</p> <p>8 A No. This is the answer if I was referring to the</p> <p>9 product winds, which would be QP 02.</p> <p>10 Q Okay. Does this document that's been marked as</p> <p>11 Exhibit 24 list the contents for the collections titled</p> <p>12 winds?</p> <p>13 A Yes.</p> <p>14 Q And that collection in your nomenclature is</p> <p>15 referred to as QP 02, correct?</p> <p>16 A Yes.</p> <p>17 Q And I think you testified earlier that QP 01 is</p> <p>18 titled essentials; is that right?</p> <p>19 A Yes.</p> <p>20 Q And is it true that QP 03 is titled thunder and</p> <p>21 rain?</p> <p>22 A Yes.</p> <p>23 Q Is it true that QP 04 is titled flowing water?</p> <p>24 A Yes.</p> <p>25 Q Is it true that QP 05 is titled waves?</p>	<p>1 that's been marked as Exhibit 25. I'll represent to you</p> <p>2 that these are documents that were provided to me by your</p> <p>3 counsel during the course of this litigation, okay?</p> <p>4 A Okay.</p> <p>5 Q Are these the -- I'm sorry. Let me strike that.</p> <p>6 Does the exhibit that's been marked as Exhibit 25 include</p> <p>7 the registrations for the six collections, QP 01 to QP 06</p> <p>8 that we've been discussing?</p> <p>9 A If you'll just give me a minute to make sure all</p> <p>10 of them are in this that you've handed me and it appears</p> <p>11 that's true.</p> <p>12 Q You'll notice that within Exhibit 25, for each</p> <p>13 collection there are two pages that refer to that, correct?</p> <p>14 A For each collection -- you said for each</p> <p>15 collection there are two pages?</p> <p>16 Q Yes. For example, for the work essentials, QP</p> <p>17 301, you'll notice that the first page of this exhibit</p> <p>18 refers to essentials and the seventh page which is HEMP</p> <p>19 000446 also refers to essentials, do you see that?</p> <p>20 A Did you say the second page?</p> <p>21 Q Seventh. I'm sorry.</p> <p>22 A Yes.</p> <p>23 Q And the dates of registration for all six of these</p> <p>24 collections are the same, correct?</p> <p>25 A It appears so.</p>

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**Q And that date is July 6, 2015, correct?**

**A** The date showing here, no. Incorrect. The date showing on these copies -- okay. Sorry. I was looking down at certification, June 25, 2015. And I see you said the effective date?

**Q I said the date. The date of registration is the term that I used.**

**A** Okay. The effective date of registration, these documents reads is July 6, 2015. And the certification is June 25, 2015.

**Q Okay. Does this document also -- let me strike that. Do these documents also indicate the date of first application?**

**A** Okay. Your question was what is the date of first publication?

**Q It was just do these documents indicate a date of first publication?**

**A** Yes.

**Q And for the collection essentials, what is the first date of publication?**

**A** September 8, 2013.

**Q So the best of your knowledge, is that correct?**

**A** I believe it is.

**Q That is information that you provided to the copy right office, correct?**

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**A** Yes.

**Q Okay. And if you can turn the page to flowing water, the date of first publication is January 22, 2014, correct?**

**A** Correct.

**Q To the best of your knowledge, is that correct?**

**A** Yes.

**Q If we turn the page to prairies, the date of publication listed is August 26, 2014, correct?**

**A** Correct.

**Q To the best of your knowledge is that date correct?**

**A** I believe so.

**Q And if we turn to thunder and rain, the date of first publication listed is November 17, 2013; is that correct?**

**A** Yes.

**Q To the best of your knowledge, is that date correct?**

**A** Yes.

**Q If we turn the page to waves, the listed date of first publication is March 11, 2014, do you see that?**

**A** I do.

**Q To the best of your knowledge S-that date correct?**

**A** Yes.

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**Q And if we turn the page to the last one which is titled winds, the listed date of first publication is December 6, 2013. Do you see that?**

**A** I do.

**Q And to the best of your knowledge, is that correct?**

**A** I believe it is.

**Q Okay. Would you agree that you registered each of those as a collection?**

**MR. TOWNSEND:** Objection. Ambiguous, calls for a legal conclusion.

**THE WITNESS:** Yes. That was my intent.

**Q (By Mr. Altenbrun) Did you register the individual files from these collections separately?**

**A** No.

**Q Go ahead.?**

**A** I think you were asking me just a moment ago if I've registered individual files as they're labeled and presented here in the collection. Okay. So my answer was correct.

**Q Let's go back to Exhibit 24 for a moment. You see the contents of this particular collection, correct?**

**A** Yes.

**Q The contents of this particular collection are subject one of the registrations that comprise Exhibit 25,**

**correct?**

**A** Yes.

**Q Is any portion the contents from the collection that is identified in Exhibit 24 the subject of any other copyright registration?**

**MR. TOWNSEND:** Object to the form.

**THE WITNESS:** That information is a database. I believe it is. And I can't -- you know, because the subject is winds, and I've published extensively and I'm known for my work in winds, I would expect that when I check my database, of which the information is also available to Pond5 in their requests for production if I'm correct, that we would find multiple copyright references

**Q (By Mr. Altenbrun) Okay. So if I understand correctly, some of the content from winds?**

**A** Yes.

**Q Is also located on some of the previous works that you have published; is that correct?**

**A** I believe so.

**MR. TOWNSEND:** Objection. Misstates prior testimony. Go ahead.

**THE WITNESS:** I believe so.

**Q (By Mr. Altenbrun) you believe so, but you don't know or you know it is?**

**A** I would know if I had the database in front of me

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8 (Pages 29 to 32)

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**Q Okay. If you know, what's the deference between 48 kit Hertz and 44.1 kill Hertz in terms of quality?**

**A** In theory, 44 .1 kill Hertz is the quality the human ear can hear and that's why it was chosen for CD. But in practice, people with very good hearing can hear better than predicted and the 48 kill Hertz is a better quality and evenly in the sound effect industry 96 kill Hertz is what many of the modern recordings are done.

**Q Have you ever made your work available for sale or license at a sample rate of 44 .1 kill Hertz?**

**A** Yes. 44.1 kill Hertz would include the earth sound series and anything else that's published on a CD.

**Q Is any of the Quiet Planet material available at 44 .1 kill Hertz?**

**A** No, it's not. In that case I make the conversion. It's what's called up sampled, okay. And so what you do is you convert from 44 .1 to 48 because sound libraries need to be at the same sampling rate so that the same files can be used in the same mixing application.

**Q If CKennedy 342 came to possess some of your work from the Quiet Planet collection would he be able to change the sample rate?**

**A** Yes, he would.

**Q Would there be any reason for him to do this?**

MR. TOWNSEND: Objection object to the form.

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Calls for speculation.

**Q (By Mr. Altenbrun) If you know.**

**A** I can speculate.

**Q Speculate away.**

**A** Okay. Speculate away that he would perceive his market thinks that 44 .1 is more valuable he might be marketing to a CD marketplace in that case no conversion or resampling needs to be changed so that people are listening to the same quality whereas if you go from 44 -- excuse me. From 48 kill Hertz, the Quiet Planet and want to produce a CD at 44 .1 you'd use what's called an I D R and that's an intelligent digital reduction plug in because when you go from one sample rate to another, it's a bit of an art. It's called dithering. And there's a lot more that I can say. But I think that's an answer.

**Q When you examined the files, ed audio files that you were up loaded by CKennedy did you identify any that had a sample rate of 44 .1 kill Hertz?**

**A** If I remember correctly, all the CKennedy files are at 44 .1 kill Hertz which actually introduces an artifact in this case and also is one of the reasons why I believe that this was a batch process, an automated process which occurred.

**Q What do you mean by introduces an artifact?**

**A** Yeah. When you create -- you notice that in the

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CKennedy files that are any length, well, most like 90 percent of the files that are minutes long, and they don't include a fade in and a fade out at the end, that's because those are loops. They're intended so when in a mixing application you have a four minute file but you actually would like 12 minutes all you do is simply drag it and because the wave form crosses in a looped piece, the Quiet Planet pieces at or near the zero axis it's a seamless thing. But when you resample the zero axis becomes different so when you resample you actually have to reloop it, find the zero crossover points. And if you don't, then it produces an audible click. The audible click is you know, sort of the tell tale sign that this file has a problem.

**Q You allege that there were 655 clips that were up loaded without your permission and that there were sales involving I think 86 of those; is that right?**

MR. TOWNSEND: I'm going to just object that it misstates prior testimony than than I didn't follow it than you did.

THE WITNESS: I sort of mentally switched whether the numbers you started with 655 and the number of sales from those 655 were 146; is that what you said?

**Q (By Mr. Altenbrun) No.**

**A** The number of files that were sold.

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**Q You contend that 655 files that were up loaded by CKennedy were owned by you, right?**

**A** Yes.

**Q And of those 655 you contend that there were sales of 86 of those; is that --**

**A** 86 file resulted in 146 sales.

**Q Right. Right. Okay. So with respect to the clips that were up loaded by CKennedy on to Pond5.com but never sold, do you believe that you were damaged?**

MR. TOWNSEND: Object to the form.

THE WITNESS: Yes. I do if an evaluation copy -- if they were accepted by Pond5, which I believe that they were, if they were presented for sale by Pond5, I believe that I was damaged. If there are down loads of the evaluation copies I was damaged. My personal you know, belief is that my files were used as a source of advertising.

**Q (By Mr. Altenbrun) Okay. So with respect to the files that never sold, you still believe that you were damaged?**

**A** Yes. Sorry.

**Q In these three ways because they were accepted by Pond5, presented for sale, and to the extent that there were down loads involving evaluation copies, correct?**

MR. TOWNSEND: Objection.

21 (Pages 81 to 84)



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1 because it was for a huge sum of money and they were hoping  
2 that I would compromise on that. But I didn't compromise.  
3 So in answer to that I would have to say that in boom's  
4 communication with me about the sky walker affair there was  
5 no mention of Pond5.

6 **Q And you have a number of MULAes that you have**  
7 **entered into, right?**

8 A The MULAes --

9 **Q Have any of your contracts been canceled as a**  
10 **result of the up loads of material to Pond5.com**

11 MR. TOWNSEND: Objection to form.

12 THE WITNESS: Not that I know of. It would  
13 have to be -- that would be a specific question. I think to  
14 somebody who has canceled. In the case of electronic arts  
15 when we recalled product and told them what the correct  
16 subscription price was they did not subscribe. And they --  
17 so that's .

18 **Q (By Mr. Altenbrun) Have any licensees of your**  
19 **products contacted you or your distributors and demanded a**  
20 **refund based on the fact that some files were up loaded for**  
21 **Pond5.com?**

22 A No.

23 **Q Have any of your licensees contacted you or your**  
24 **distributors and demanded an alteration of terms based upon**  
25 **the fact that content was up loaded to Pond5.com**

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1 MR. TOWNSEND: Object to the form.

2 THE WITNESS: No.

3 **Q (By Mr. Altenbrun) Has any potential licensee**  
4 **informed you that they are not going forward on a potential**  
5 **purchase because of the up loading of files to Pond5.com?**

6 MR. TOWNSEND: Object to the form. Calls for  
7 speculation.

8 THE WITNESS: Indirectly. But I think your  
9 question specifies Pond5. And in the conversation that I  
10 had Pond5's name was not given.

11 **Q (By Mr. Altenbrun) Okay what do you mean**  
12 **indirectly?**

13 A Indirectly in that it was reported that a  
14 different source had been found.

15 **Q Explain to me?**

16 A In the earlier conversation that I had with you  
17 with Franz in which we were discussing the fellow that came  
18 to me that wanted wind sounds for example and were working  
19 on this windy app. So I believe that Franz was in  
20 conversation with him sort of like saying let's get  
21 together, let's create a super app rather than two separate  
22 competing apps and he was the guy, he was very much  
23 interested in my sounds. But he reported to France and  
24 Franz reported to me that he had found a different source of  
25 quality Sounds.

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1 **Q Right. Okay. Who is that licensee that made this**  
2 **report of finding alternative sources?**

3 A I don't have his name. I looked for his name and  
4 I tried to recall it. Believe me I really wanted to know.  
5 And I have been unable to find it in my records.

6 **Q But would you agree with me that you can't say one**  
7 **way or the other whether that alternative source was Pond5**

8 MR. TOWNSEND: Objection. Calls for  
9 speculation.

10 THE WITNESS: It's only my curiosity.

11 **Q (By Mr. Altenbrun) In the lawsuit that you filed**  
12 **in this case you attached to your complaint numerous**  
13 **exhibits. In the exhibits at least many of them were**  
14 **copyright registrations. Do you recall that?**

15 A No. I actually don't recall that.

16 **Q I'll represent to you that your complaint has 18**  
17 **exhibits and they are all copyright registrations. Okay?**

18 A Okay.

19 **Q My question is amongst those exhibits, there are**  
20 **not included the copyright registrations for your Quiet**  
21 **Planet collection, which we've identified as an exhibit. Do**  
22 **you know why the recent copyright registrations were not**  
23 **included as an exhibit for your complaint?**

24 MR. TOWNSEND: Objection to the extent it  
25 calls for attorney-client privileged communication, calls

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1 for a legal conclusion, misstates prior testimony.

2 THE WITNESS: Because the documents had not  
3 been received yet from the copyright office.

4 **Q (By Mr. Altenbrun) Your complaint -- I'm not**  
5 **going to mark this as an exhibit. Your complaint also**  
6 **clause paragraph in which you list 17 registered copyrights.**  
7 **But your most recent copyrights from the Quiet Planet**  
8 **collection are not listed. Do you know why?**

9 MR. TOWNSEND: Same objection.

10 THE WITNESS: Same answer.

11 **Q (By Mr. Altenbrun) Well, I understand I guess**  
12 **that you didn't have the documents. But you at least these**  
13 **copyrights were issued before your file the complaint**  
14 **weren't they?**

15 A I did not have them in my hands, no: You're  
16 talking about the Quiet Planet copyrights?

17 **Q Yes. I am.**

18 (Exhibit Number 31 marked

19 **Q (By Mr. Altenbrun) The exhibit that's been handed**  
20 **to you and marked as Exhibit 31, these are responses to**  
21 **discovery that your attorney submitted to me in the past few**  
22 **days, okay?**

23 A Yes.

24 **Q And if you go to the last page of this exhibit,**  
25 **there's a verification page. Was that signed by you?**

33 (Pages 129 to 132)



Page 165	Page 167
<p>1 <b>Q And it continues if you look at this through page</b>  2 <b>HEMP 001610, 1,610,</b>  3 A Okay.  4 <b>Q Does this mean that at the time this list was</b>  5 <b>compiled, there were 563 license holders for that essentials</b>  6 <b>collection?</b>  7 A No.  8 <b>Q Okay.</b>  9 A It means that there were -- actually I know this  10 from the sales data that came in. The last time I entered  11 the sales data from the resellers like boom and also that  12 was the early part of this year, but for every sale that  13 comes in, to Quiet Planet the registration happens  14 immediately. I don't have to import from a spreadsheet that  15 somebody else provided me and do all that conversion work  16 which is much more cumbersome. So basically, it would be  17 all the essentials would be here plus the documents that  18 were provided that reported sales from boom and the  19 resellers. Okay?  20 <b>Q I think I understand. But so this would be</b>  21 <b>complete through some date from earlier this year when you</b>  22 <b>entered in manually those sales from boom and third party</b>  23 <b>distributors, but it would -- and it would -- but it would</b>  24 <b>not be current because there's been some period of months</b>  25 <b>where you haven't entered those into this?</b></p>	<p>1 also very little other information. The second page is the  2 metadata that I saw in possibly the valuation copy of dath  3 rigs. And the next page -- oh, is the receipt. Okay. So  4 I'm uncertain if the second page is the metadata that was in  5 the bought copy or the evaluation copy. By in any case  6 that's a display of metadata as displayed through using the  7 called sound miner or the dath rigs sound file called  8 environmental series rain forest. And then the next piece  9 of paper is the receipt that was issued to Peter Connolly  10 who I asked to download this so I could evaluate the sound  11 file.  12 <b>Q When did you first become aware this this</b>  13 <b>particular file was on Pond5's website?</b>  14 A I think it was pretty close to the transaction  15 date of -- and the transaction date that appears on the  16 receipt is 11/18/2015.  17 <b>Q When did you, if you know, inform Pond5 that this</b>  18 <b>was located on their website?</b>  19 A I imagine it was just a couple days ago.  20 <b>Q Why is it that you waited?</b>  21 A I waited --  22 <b>Q -- ten months.</b>  23 MR. TOWNSEND: object to the extent it calls  24 for a legal conclusion. excuse me. Attorney-client  25 privileged communications. Go ahead and answer.</p>
Page 166	Page 168
<p>1 A Because of the delay in quarterly sales, right,  2 the quarterly gets reported in the next quarter. That I  3 believe it would be more accurate to say that these are all  4 the license users period for essentials as of let's say  5 November, 2015, and all the licenses that were sold directly  6 from Quiet Planet up until now.  7 <b>Q Right. And if I wanted to find the additional</b>  8 <b>sales, I could go to your invoices, for instance. No? What</b>  9 <b>document I would examine?</b>  10 A You go to sales report that boom provide to me  11 which was included in the list of production.  12 <b>Q And that document is entitled sales</b>  13 <b>report? What's the title of that document?</b>  14 A I think it would read something like boom Q  15 42,015. And then a spreadsheet would be revealed in and  16 then we would see boom Q 12,016, and you know, it goes on  17 like that.  18 <b>Q Okay.</b>  19 (Exhibit Number 41 marked.)  20  21 <b>Q (By Mr. Altenbrun) The document that's been</b>  22 <b>marked as Exhibit 41, can you tell me what this document is?</b>  23 A Yeah, the document Exhibit 41 the first page is a  24 screen shot of dath rigs (CHECK SPELLING), a pirate of my  25 work that appears on Pond5. And shows the wave form and</p>	<p>1 THE WITNESS: Okay. I waited because I  2 listen to the sound file and I felt like it was unusable.  3 At the time that I visited, it was zero sales so it posed no  4 threat. If it had been 20 sales I think that I would have  5 immediately reported it and everything and I felt like it  6 still served a purpose. Because my goal all along has been  7 to work with Pond5 to scrub my work from the Pond5 system  8 Because just because we're talking about CKennedy and now  9 we're talking about dath rigs doesn't eliminate the  10 possibility that there's others in those 14 thousand plus  11 nature sounds that come up in the search. That's a daunting  12 task. But if Pond5 comes back to me and says we've cleaned  13 the system, and if dath riggs is gone, I believe it. Okay.  14 If dath riggs is still there, I say we have more work to do  15 and we can work together to kind of refine the system. So  16 it's still serve ad purpose. I didn't feel like it served a  17 threat. There were no sales. And so that is the reason  18 why.  19 <b>Q Is this file contained within the Quiet Planet</b>  20 <b>collection?</b>  21 A No. This file is the result of using files that  22 are within the Quiet Planet collection and creating a rather  23 high density collage. And that was the reason why I felt  24 like it was unusable for the sound effects industry because  25 it was so highly specified.</p>

# **EXHIBIT 22**

# Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

*Maria A. Pallante*

United States Register of Copyrights and Director

**Registration Number**

**SR 771-249**

**Effective Date of Registration:**

July 06, 2015

## Title

**Title of Work:** Winds

## Completion/Publication

**Year of Completion:** 2013

**Date of 1st Publication:** December 06, 2013

**Nation of 1st Publication:** United States

## Author

• **Author:** Gordon Walker Hempton  
**Author Created:** sound recording  
**Work made for hire:** No  
**Citizen of:** United States  
**Year Born:** 1953

## Copyright Claimant

**Copyright Claimant:** Gordon Walker Hempton  
POB 900, Indianola, WA, 98342, United States

## Rights and Permissions

**Name:** Gordon Hempton  
**Email:** gordon@soundtracker.com  
**Telephone:** (360)477-9588  
**Address:** POB 900  
Indianola, WA 98342

## Certification

**Name:** Gordon Hempton  
**Date:** June 25, 2015

# Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

*Maria A. Pallante*

United States Register of Copyrights and Director

Registration Number

**SR 771-059**

Effective Date of Registration:

July 06, 2015

## Title

Title of Work: Waves

## Completion/Publication

Year of Completion: 2014

Date of 1st Publication: March 11, 2014

Nation of 1st Publication: United States

## Author

• Author: Gordon Walker Hempton  
Author Created: sound recording  
Work made for hire: No  
Citizen of: United States  
Year Born: 1953

## Copyright Claimant

Copyright Claimant: Gordon Walker Hempton  
POB 900, Indianola, WA, 98342, United States

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## Certification

Name: Gordon Hempton  
Date: June 25, 2015



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*Maria A. Pallante*

United States Register of Copyrights and Director

Registration Number

**SR 771-251**

Effective Date of Registration:

July 06, 2015

### Title

Title of Work: Thunder and Rain

### Completion/Publication

Year of Completion: 2013

Date of 1st Publication: November 17, 2013

Nation of 1st Publication: United States

### Author

• Author: Gordon Walker Hempton  
Author Created: sound recording  
Work made for hire: No  
Citizen of: United States  
Year Born: 1953

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*Maria A. Pallante*

United States Register of Copyrights and Director

Registration Number

**SR 771-205**

Effective Date of Registration:

July 06, 2015

### Title

Title of Work: Prairies

### Completion/Publication

Year of Completion: 2014

Date of 1st Publication: August 26, 2014

Nation of 1st Publication: United States

### Author

• Author: Gordon Walker Hempton  
Author Created: sound recording  
Work made for hire: No  
Citizen of: United States  
Year Born: 1953

### Copyright Claimant

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Indianola, WA 98342 United States

### Certification

Name: Gordon Hempton  
Date: June 25, 2015



## Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

*Maria A. Pallante*

United States Register of Copyrights and Director

Registration Number

**SR 771-212**

Effective Date of Registration:

July 06, 2015

### Title

Title of Work: Flowing Water

### Completion/Publication

Year of Completion: 2014

Date of 1st Publication: January 22, 2014

Nation of 1st Publication: United States

### Author

• Author: Gordon Walker Hempton  
Author Created: sound recording  
Work made for hire: No  
Citizen of: United States  
Year Born: 1953

### Copyright Claimant

Copyright Claimant: Gordon Walker Hempton  
POB 900, Indianola, WA, 98342, United States

### Rights and Permissions

Name: Gordon Walker Hempton  
Email: gordon@soundtracker.com  
Telephone: (360)477-9588  
Address: POB 900  
Indianola, WA 98342

### Certification

Name: Gordon Hempton  
Date: June 25, 2015

## Certificate of Registration



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*Maria A. Pallante*

United States Register of Copyrights and Director

**Registration Number**

**SR 771-248**

**Effective Date of Registration:**

July 06, 2015

### Title

**Title of Work:** Essentials

### Completion/Publication

**Year of Completion:** 2013

**Date of 1st Publication:** September 08, 2013

**Nation of 1st Publication:** United States

### Author

• **Author:** Gordon Walker Hempton  
**Author Created:** sound recording  
**Citizen of:** United States  
**Domiciled in:** United States  
**Year Born:** 1953

### Copyright Claimant

**Copyright Claimant:** Gordon Walker Hempton  
POB 900, Indianola, WA, 98342, United States

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**Email:** gordon@soundtracker.com  
**Telephone:** (360)477-9588  
**Address:** POB 900  
Indianola, WA 98342

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**Date:** June 25, 2015